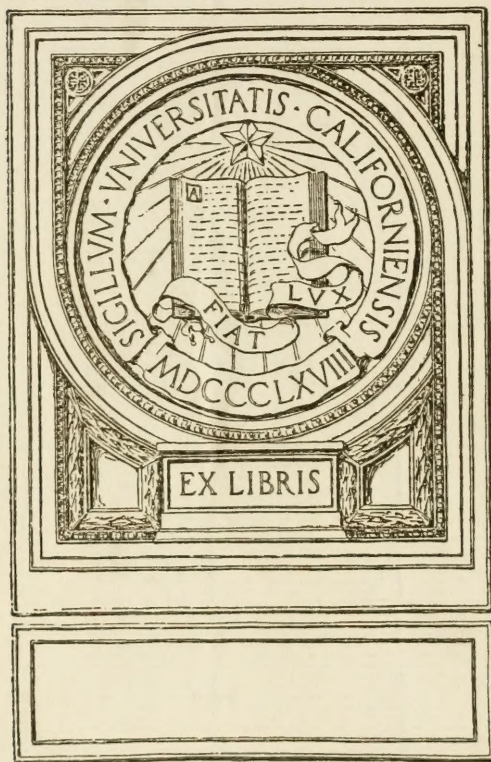
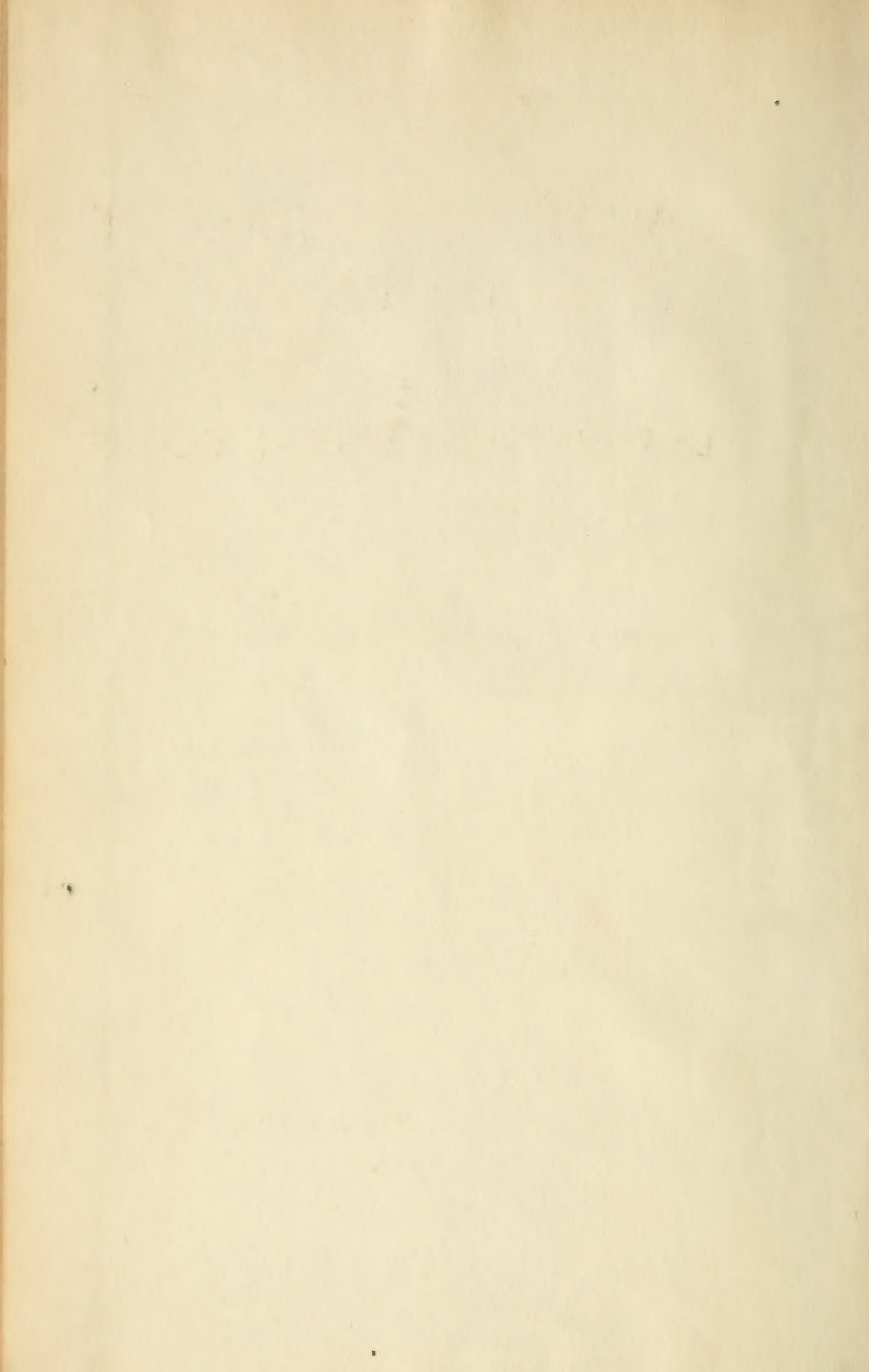


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THE
DIPLOMATIC PROTECTION OF
CITIZENS ABROAD

OR

THE LAW OF INTERNATIONAL CLAIMS

BY

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To
JOHN BASSETT MOORE

PREFACE

With the drawing together of the world by increased facilities for travel and communication, the number of persons going abroad for purposes of business or of pleasure has steadily increased. Coincidentally, an increasing amount of capital, American as well as European, has been seeking investment in foreign countries, and the growth of international commerce and intercourse has resulted in the creation of vast commercial and other interests abroad. These movements of men, money, and commodities, while of economic advantage to the exploiting and to the exploited country and establishing bonds of mutual dependency between them, also create occasional friction.

The individual abroad finds himself in legal relation to two countries, the country of which he is a citizen, and the country in which he resides or establishes his business. From the point of view of the one, he is a citizen abroad; from the point of view of the other, he is an alien. The common consent of nations has established a certain standard of conduct by which a state must be guided in its treatment of aliens. In the absence of any central authority capable of enforcing this standard, international law has authorized the state of which the individual is a citizen to vindicate his rights by diplomatic and other methods sanctioned by international law. This right of diplomatic protection constitutes, therefore, a limitation upon the territorial jurisdiction of the country in which the alien is settled or is conducting business.

The standard of treatment which an alien is entitled to receive is incapable of exact definition. The common practice of the civilized nations and the adjudication of conflicts between nations, particularly by arbitration, arising out of alleged violations of the rights of citizens abroad, have nevertheless developed certain fundamental principles from which no nation can depart without incurring international responsibility to the national state of the person injured. The right which every state possesses to protect its citizens abroad is correla-

tive to its obligation to accord foreigners a measure of treatment satisfying the requirements of international law and applicable treaties, and to its responsibility for failure to accomplish this duty. Practice has demonstrated that the mere fact that aliens have been granted the rights authorized by local law, and equality of treatment with natives, is not necessarily regarded as a final compliance with international obligations, if the local measure of justice and administration in a given case falls below the requirements of the international standard of civilized justice, although it is always a delicate proceeding, in the absence of extraterritoriality, to charge that a rule of municipal law or administration fails to meet the international standard.

Citizens abroad, therefore, have in the vindication of their rights an extraordinary legal remedy not open to natives. However just it may be to confine the alien to the rights granted by local law, predicated state liability merely upon the state's failure to make its grant effective, practice has shown that nations of the Western European type are unwilling unreservedly to concede the application of this principle to some of the weaker countries of the world. While tacitly undertaking to abide by the local law, a rule supported by principle, international practice has given aliens a reserved power, after the vain exhaustion of local remedies, to call upon the diplomatic protection of their own government, if their rights, as measured not necessarily by the local, but by the international, standard have been violated. The citizen abroad has no legal right to require the diplomatic protection of his national government. Resort to this remedy of diplomatic protection is solely a right of the government, the justification and expediency of its employment being a matter for the government's unrestricted discretion. This protection is subject in its grant to such rules of municipal administrative law as the state may adopt, and in its exercise internationally to certain rules which custom has recognized.

The study of the right of diplomatic protection, therefore, involves an examination of three distinct legal relations: that existing, first, between the state and its citizen abroad; secondly, between the alien and the state of residence; and, thirdly, between the two states concerned with respect to their mutual rights and obligations. In

Part I of this work these relations will be discussed somewhat independently. The line of development will involve, first, a study of the relation between the state and its own citizen, particularly in respect to the state's right and obligation to protect him, and secondly, a study of the rights of the alien in the country of his residence under the general principles of international law and in municipal law, comparatively treated. If the rights of an alien are invaded, he must, as a general rule, in first instance, resort to the remedies provided by municipal law. The attempt has, therefore, been made in the third chapter, which deals with the municipal responsibility of the state, to study, in the field of municipal public law, comparatively considered, the incidence of liability between the state and the wrongdoing officer, and the remedies afforded to the injured individual in cases where public responsibility is alleged. If these municipal remedies are exhausted in vain and a denial of justice in the international sense is alleged by the alien's national government, the international responsibility of the state of residence is invoked. In other words, the deviation by a state from the special obligations of treaties, or from that international standard of civilized justice to which the alien, by universal recognition, is entitled, gives rise to its international responsibility toward the alien's national government. The fourth and following chapters, on international responsibility, lead, finally, to a consideration of the relation between the two states concerned, the protecting state and the state of residence.

In Part II, the nature, exercise, and effect of protection are discussed, and particularly the relation between the public claim of the state and the private claim of the injured citizen. Among other matters, the following topics receive consideration: the theory of the protective function and its operation, the true nature of an international claim arising out of an injury to a citizen, the relation between the public and the private demand, in international and in municipal law, the discretionary nature of protection, the control of the government, the extent of protection, the means of protection, and the collection and distribution of indemnities and arbitral awards.

In Part III, the person or national interest receiving protection is considered. This involves a study of citizenship in its international

relations and of those persons, entities and objects which are entitled to national protection.

In Part IV, the facts, acts and considerations which operate as conditions, qualifications and limitations upon the right to diplomatic protection and the prosecution and recovery of international claims are considered, including the conditions prescribed by the protecting government, and the limitations arising out of the act or failure to act of the citizen himself, out of the subject-matter, and out of the necessity for taking account of the primary interests of the state and the accepted rules of international intercourse.

In the present work, the practice of the United States through the Department of State and of other countries through their Foreign Offices, in the exercise of the right of diplomatic protection, and the awards of arbitral tribunals passing upon international pecuniary claims have been used as principal sources. The practice of the United States in matters of diplomatic protection may well be regarded as a close approach to a just standard of international practice, for the United States has been and is both an exploiting and an exploited country. The views and the principles it has declared in the exercise of its right to protect American citizens abroad have, as a general rule, been tempered by the knowledge that it must recognize as belonging to aliens within this country the same rights that it seeks to establish for its citizens abroad, the measure of its obligations being the measure of its rights. The effort has been made to discount argumentative and controversial positions which have occasionally been assumed, where a course has been adopted without regard either to the real principles involved or to the ultimate interests of the United States.

The decisions and awards of arbitral tribunals passing upon pecuniary claims instituted by aliens, through their national governments, against the foreign governments in which they may reside or do business are a most important guide in determining the reciprocal rights and obligations of states in the protection of individuals. By the submission of a private claim to arbitration the two countries in controversy provide a forum to determine the extent of the legal injury which the state has sustained in the person of its citizen, and the legal right to and amount of reparation payable as indemnity. The two

states substitute for diplomatic negotiation and resort to self-help an independent tribunal with jurisdiction to pass upon the justification for extending protection and the merits of the defense in a given case. Hence the great authority of arbitral decisions as a criterion for the mutual rights and obligations of states with respect to individuals, and the reliance placed by Foreign Offices upon arbitral awards, as precedents, in the presentation of and defense against international claims arising out of alleged violations of the rights of individuals.

The practice and the science of international law owe to Professor John Bassett Moore an immeasurable debt. Apart from his invaluable personal services to various administrations, he has, by the publication of his monumental works, the *Digest of International Law* and the *History and Digest of International Arbitrations*, furnished to the officials of the Department of State constant and trustworthy guidance in the conduct of the country's foreign relations. The writer's personal indebtedness to Professor Moore is but feebly expressed in owning the gratitude which he feels for friendly counsel always generously placed at his disposal and for the stimulus to sound scholarship which Professor Moore unconsciously inspires.

This occasion is taken to express the author's sense of obligation to Dr. George W. Scott for awakening in him an interest in and appreciation of the importance of the present subject, and to Mr. J. Reuben Clark, Jr., formerly Solicitor of the Department of State, Mr. Richard W. Flournoy, Jr., Chief of the Bureau of Citizenship, and Professor W. F. Dodd of the University of Chicago, for their kindness in reading various sections of the manuscript and for their valuable suggestions.

EDWIN M. BORCHARD.

March 1, 1915.

TABLE OF CONTENTS

PART I

RELATION BETWEEN STATE AND CITIZEN, STATE AND ALIEN, AND BETWEEN STATE AND STATE

CHAPTER I

INTRODUCTION

	PAGE
RELATION BETWEEN STATE AND INDIVIDUAL—GENERAL PRINCIPLES.....	3
§ 1. State and Individual.....	3
§ 2. Growth of Territoriality of Law.....	3
NATIONALITY.....	7
§ 3. Development of Nationality.....	7
§ 4. Nature of Citizenship.....	7
§ 5. Nature of the Bond.....	9
§ 6. "Temporary Allegiance" of Aliens.....	11
§ 7. Source of Rights of Individual.....	11
§ 8. Nationality as Title to International Redress for Violation of Rights.....	15
§ 9. Position of the Individual in International Law.....	16
§ 10. Characteristics of Bond of Nationality.....	19
§ 11. Dual and No Nationality.....	19
§ 12. Citizens in International and in Constitutional Law.....	20
§ 13. Rights and Duties of State and Citizen Abroad.....	21
PROTECTION ABROAD.....	25
§ 14. Diplomatic Protection a Limitation on Territorial Jurisdiction....	25
§ 15. Right and Duty of Protection.....	29
THE PROTECTIVE FUNCTION.....	30
§ 16. Political Philosophy. Function of the State.....	30

CHAPTER II

THE ALIEN

§ 17. Historical Development of Legal Position of Alien.....	33
§ 18. Relation of Law of Aliens to Different Branches of Law.....	36
§ 19. Position of Alien in Municipal Law.....	36
§ 20. Sources of the Law of Aliens.....	38

	PAGE
MINIMUM OF RIGHTS DUE TO ALIENS.....	39
§ 21. Method of Establishing Minimum.....	39
§ 22. Recognition of Legal Personality.....	40
§ 23. Status of Foreign Corporations.....	41
§ 24. Other Rights of the Alien.....	42
MAXIMUM POWER OF STATE OVER ALIENS.....	43
§ 24a. Matters of Public Law.....	43
§ 25. Matters of Private Law.....	44
ADMISSION AND EXCLUSION.....	44
§ 26. State's Right of Exclusion.....	44
EXPULSION.....	48
§ 27. State's Power to Expel.....	48
§ 28. Grounds of Expulsion.....	51
§ 29. Method of Exercising Right of Expulsion.....	54
§ 30. International Phases of Expulsion.....	55
§ 31. Grounds of International Claims.....	57
§ 32. In Time of War.....	61
§ 33. Extradition.....	62
POLITICAL RIGHTS AND DUTIES.....	63
§ 34. These not Usually Ascribed to Aliens.....	63
§ 35. Military Service.....	64
CIVIL RIGHTS.....	69
§ 36. Meaning of the Term.....	69
§ 37. Types of Legislative Systems.....	71
§ 38. Public Rights.....	73
§ 39. Private Rights.....	86
§ 40. Transient and Domiciled Aliens.....	91
§ 41. Subjection to Territorial Law.....	94
§ 42. Criminal Proceedings.....	96
§ 43. Limitations upon Territorial Jurisdiction—Extraterritoriality.....	102
§ 44. Equality of Alien and National not always Internationally Sufficient.....	104
§ 45. Treaty Rights of Aliens in the United States.....	107
POSITION IN WAR.....	109
§ 46. Aliens in War.....	109

CHAPTER III

MUNICIPAL RESPONSIBILITY OF THE STATE

§ 47. Outline of the Subject.....	116
§ 48. Distinction between Governmental and Corporate Functions.....	117
§ 49. Judicial Control over Acts of Administration.....	118
§ 50. When State is Responsible, and Incidence of Liability.....	120
THE STATE AS A PUBLIC POWER.....	125
§ 51. Acts of Legislation—No Responsibility the Rule.....	125

	PAGE
§ 52. Judicial Acts.....	129
EXECUTIVE AND ADMINISTRATIVE ACTS.....	131
§ 53. Judicial Control.....	131
THE FRENCH SYSTEM.....	134
§ 54. Different Classes of Administrative Acts. Recourse of Individual and State Responsibility.....	134
§ 55. Respective Liability of State and Officer.....	138
§ 56. Limitations on State Liability for Administrative Acts.....	139
§ 57. Liability of Municipalities.....	140
§ 58. Résumé.....	142
THE GERMAN SYSTEM.....	142
§ 59. Judicial Control over Acts of Administration.....	142
§ 60. Pecuniary Liability of the State.....	143
SYSTEMS OF OTHER EUROPEAN COUNTRIES.....	147
§ 61. Spain.....	147
§ 62. Italy.....	148
§ 62a. Austria-Hungary.....	150
§ 63. Switzerland.....	152
§ 64. Belgium and Other Countries.....	153
§ 65. Roumania.....	154
§ 66. Comparison of Continental Systems.....	155
ANGLO-AMERICAN SYSTEM.....	156
§ 67. Judicial Control over Acts of Administration.....	156
§ 68. Suit for Pecuniary Damages—Liability of Municipal Corporations.....	157
§ 69. Principle of State Immunity from Pecuniary Liability.....	159
§ 70. Limited Right of Action Granted by Statute.....	162
LIABILITY OF OFFICERS—COMPARATIVE LAW.....	171
§ 71. Right to Sue Officer. The Method of Protecting Officer.....	171
§ 72. Foreign States before Municipal Courts.....	175

CHAPTER IV

INTERNATIONAL RESPONSIBILITY OF THE STATE

§ 73. General Principles.....	177
AUTHORITIES OF THE STATE.....	180
§ 74. Different Classes of Authorities.....	180
LEGISLATIVE AUTHORITIES.....	181
§ 75. Acts of Legislation.....	181
EXECUTIVE AND ADMINISTRATIVE AUTHORITIES.....	183
§ 76. Limitations upon their Power. Contractual Relations.....	183
§ 77. Tortious Acts.....	185
§ 78. Diplomatic, Naval and Military Officers.....	187
§ 79. Minor Officials.....	189
§ 80. Soldiers.....	193

	PAGE
JUDICIAL AUTHORITIES.....	195
§ 81. Position of Courts and Judges.....	195
POLITICAL SUBDIVISIONS OF THE STATE.....	199
§ 82. Responsibility of Central Government for its Constituent Parts . . .	199
§ 83. Succession of States and Apportionment of Debts.....	202
DE FACTO GOVERNMENTS.....	205
§ 84. Different Kinds. Transmission of Obligations.....	205
§ 85. Criteria of De Facto Government. Effect of Recognition.....	210

CHAPTER V

INTERNATIONAL RESPONSIBILITY OF THE STATE—Continued

ACTS OF INDIVIDUALS

§ 86. Obligations of the Government.....	213
§ 87. Factors Imposing Liability upon the Government.....	217
§ 88. Brigandage.....	219
MOB VIOLENCE.....	220
§ 89. Obligations of the Government.....	220
§ 90. Special Protection Due in Certain Cases.....	222
§ 91. Factors Imposing Liability upon the Government.....	223
§ 92. Statutory Compensation by Municipalities.....	226
CIVIL WAR INJURIES.....	228
§ 93. General Principles and Theory.....	228
§ 94. Limitations on General Rules. Effect of Recognition, Continued Residence, Participation and Amnesty.....	235
§ 95. Insurgents in Temporary Control of Limited Areas.....	239
§ 96. Successful Revolution.....	241
§ 96. Experience of Latin-America.....	242

CHAPTER VI

INTERNATIONAL RESPONSIBILITY OF THE STATE—Continued

WAR CLAIMS

§ 98. Belligerent and Private Rights.....	246
§ 99. Theory of Compensation for War Losses.....	247
§ 100. A State of War.....	248
§ 101. Position of Aliens in Hostile Territory.....	250
§ 102. Enemy Character.....	253
§ 103. War on Land.....	255
§ 104. Appropriation of Private Property.....	262
§ 105. Requisitions and Contributions.....	267
§ 106. War at Sea.....	270

	PAGE
§ 107. Neutral Obligations.....	277
§ 108. State Indemnity.....	279

CHAPTER VII

INTERNATIONAL RESPONSIBILITY OF THE STATE—Continued

CONTRACTUAL CLAIMS

§ 109. Exceptional Position of Claims Arising out of Contracts.....	281
§ 110. Three Classes of Contractual Claims. Distinctions.....	281
CONTRACTS BETWEEN INDIVIDUALS.....	283
§ 111. Absence of Governmental Interest.....	283
CONTRACTS BETWEEN CITIZEN AND FOREIGN GOVERNMENT.....	284
§ 112. Formal Interposition Not Customary.....	284
§ 113. Use of Good Offices Authorized.....	288
§ 114. Qualifications of General Rule of Non-Interposition.....	291
§ 115. Arbitration.....	296
BONDS OF PUBLIC DEBT.....	302
§ 116. Claims Arising out of Unpaid Bonds.....	302
§ 117. Nature of Public Loan and Law Governing.....	302
§ 118. Remedy in Municipal Courts.....	305
§ 119. International Remedies. The Drago Doctrine.....	308
§ 120. Diplomatic Interposition and Intervention. Opinions of Publicists.....	310
§ 121. Practice of Nations.....	313
§ 122. The Porter Proposition at The Hague.....	318
§ 123. Relation between Porter Proposition and Drago Doctrine.....	321
§ 124. Public Bonds before Tribunals of Arbitration.....	322
§ 125. The United States and Central-American Loans.....	325
§ 126. Conclusion.....	327

CHAPTER VIII

INTERNATIONAL RESPONSIBILITY OF THE STATE—Continued

DENIAL OF JUSTICE

§ 127. Meaning of the Term.....	330
§ 128. Conditions Incident and Precedent to Diplomatic Interposition.....	331
§ 129. "Denial of Justice" in International Practice.....	335
§ 130. Extent to which Unjust Judgment of Municipal Court is Internationally Binding.....	340

CHAPTER IX

RELATION BETWEEN STATES

§ 131. Mutual Concessions by States.....	344
§ 132. Diplomatic Protection a Limitation on Territorial Jurisdiction.....	346

PART II

THE EXERCISE OF DIPLOMATIC PROTECTION

CHAPTER I

NATURE, BASIS AND THEORY OF PROTECTION

	PAGE
§ 133. Fundamental Principles	349
§ 134. Theory of the State's Protection	351
§ 134a. Diplomatic Protection an Extraordinary Legal Remedy	352
§ 135. Basis of the Public Action of the State	353
§ 136. Protection in Operation	354

CHAPTER II

RELATION BETWEEN THE PRIVATE AND THE PUBLIC INJURY

§ 137. Method of Presenting a Private Claim	355
§ 138. Citizen's Title to Protection Not a Legal Right; An Extraordinary Legal Remedy	356
§ 139. Merger of the Private Claim into the National Claim of the State	356
§ 140. Effect of National Character of the Claim	359
§ 141. Varying Effects of Merger of Different Classes of Claims	360
§ 142. National Claims which Survive Private Settlement	362
PROTECTION DISCRETIONARY WITH THE EXECUTIVE	363
§ 143. Discretion Uncontrollable by Courts	363

CHAPTER III

GOVERNMENT CONTROL OVER CLAIMS

§ 144. Power to Settle, Compromise, Release or Abandon Claim	366
§ 145. No Obligation to Consult Claimant	371
§ 146. Power to Determine Opportunity for Pressing Claim	372
§ 147. Government's Power to Renounce Indemnity	373
§ 148. Government not Liable for Mismanagement	376
§ 149. Circumstances under which Government is Liable	378

CHAPTER IV

DISTRIBUTION OF AWARDS AND INDEMNITIES

§ 150. Two Stages of the Proceedings; The International and the Mu- nicipal	381
§ 151. Finality of Awards	382

	PAGE
§ 152. Award or Indemnity a National Fund, Free from Individual Lien	383
§ 153. Nature of Individual Claimant's Title to Fund	384
§ 154. Its Distribution a Matter of Executive or Congressional Discretion, Free from Judicial Control.	385
§ 155. Practice of Department of State under Act of February 27, 1896	388
§ 156. Who are "Claimants" Entitled to Distribution of Funds.	391
§ 157. Conflicting Claims of Secondary Beneficiaries Usually Referred to Courts.	392
§ 158. Method of Proving Title as Claimant or Beneficiary	393
§ 159. Method of Making Payment.	395
§ 160. Remedies of Rival Claimants or Beneficiaries. Secretary's Deter- mination not Final.	396
§ 161. Expenses of Arbitration Usually Charged to Claimants.	397

CHAPTER V

EXTENT OF PROTECTION

§ 162. Factors Determining Measure of Protection.	399
§ 163. Fostering American Interests Abroad.	400
§ 164. Preventive Measures.	401
§ 165. Request for Local Protection in Foreign Country.	402
§ 166. Consular Administration of Decedents' Estates.	404
§ 167. Degree of Assistance in Certain Cases.	405
§ 168. The Backward Countries of Near and Far East.	406
§ 169. Miscellaneous Cases.	407
§ 170. Criminal Proceedings Abroad.	407
§ 171. Financial Relief.	409
MEASURES OF DAMAGES.	413
§ 172. Direct and Indirect Damage.	413
§ 173. Circumstances under which Claims for Indirect Damages Allowed	416
§ 174. Punitive or Exemplary Damages.	419
§ 175. Maritime Torts.	419
§ 176. Ordinary Contract and Tort Claims.	422
§ 177. Personal Injuries.	423
§ 178. Measure of Damages in Claims arising out of Chinese Revolution of 1911.	426
INTEREST.	428
§ 179. Absence of any Settled Rule of Allowance.	428
EXTRATERRITORIAL PROTECTION.	430
§ 180. Protection Amounting to Jurisdiction.	430
§ 181. Sources of Extraterritorial Rights.	431
§ 182. Origin and Development of the System.	432

CHAPTER VI

MEANS OF PROTECTION

	PAGE
§ 183. Agencies of Protection.....	435
§ 184. Consular Service.....	435
§ 185. Treaties.....	438
§ 186. Methods of Redress of Injuries.....	439
AMICABLE METHODS.....	439
§ 187. Diplomacy.....	439
§ 188. Good Offices.....	440
§ 189. Diplomatic Interposition.....	441
§ 190. Mediation.....	442
§ 191. Arbitration.....	442
NON-AMICABLE METHODS.....	445
§ 192. Withdrawal of Diplomatic Representative.....	445
§ 193. Retorsion.....	445
§ 194. Display of Force.....	446
§ 195. Use of Armed Force.....	448
§ 196. Reprisals.....	453
§ 197. War.....	455

PART III

THE OBJECT OF PROTECTION—THE PERSON AND PROPERTY OF
CITIZENS

CHAPTER I

CITIZENSHIP THE PRIMARY TITLE TO PROTECTION

§ 198. American Citizenship.....	457
§ 199. Naturalized Citizens Abroad.....	460
§ 200. Citizenship Usually Essential to Protection.....	462
§ 201. Occasional Protection of Foreigners.....	463
PROTECTION OF FOREIGNERS IN "EXTRATERRITORIAL" COUNTRIES.....	467
§ 202. Extraterritorial Protection and Jurisdiction.....	467
§ 203. Protégé System.....	468
DELEGATED PROTECTION.....	471
§ 204. Accompanying Conditions.....	471
§ 205. Occasions of Exercise.....	472
SEAMEN.....	475
§ 206. American Seamen. Meaning of the Term.....	475
VESSELS.....	478
§ 207. Evidence of Nationality.....	478
§ 208. American Ownership the Test of Title to Protection.....	480
§ 209. Proper Use of Flag.....	483

CHAPTER II

PROOF AND EVIDENCE OF CITIZENSHIP

	PAGE
§ 210. By whom Determined.....	486
PROOF OF CITIZENSHIP.....	488
§ 211. Methods of Proof.....	488
§ 212. Rules of International Tribunals of Arbitration.....	490
EVIDENCE OF CITIZENSHIP.....	492
§ 213. Classes of Documentary Evidence.....	492
THE PASSPORT.....	493
§ 214. Nature and Purpose of Passport System.....	493
§ 215. Relation of Passport to Diplomatic Protection.....	493
§ 216. Regulations Governing Issuance.....	496
§ 217. To Whom Issued.....	500
§ 218. Requirements of Foreign Governments.....	504
§ 219. Latest Passport Rules.....	508
§ 220. Circular Instruction Concerning New Passport Regulations.....	512
OTHER FORMS OF EVIDENCING CITIZENSHIP.....	514
§ 221. Certificate of Naturalization.....	514
§ 222. Certificate of Registration.....	515
IMPEACHMENT OF CITIZENSHIP.....	517
§ 223. Who May Impeach.....	517
§ 224. Nature of Certificate of Naturalization. Its Character as Res Adjudicata.....	519
§ 225. Conclusiveness upon Municipal Courts.....	520
§ 226. The Practice of International Tribunals of Arbitration.....	522
§ 227. Conclusiveness upon the Executive.....	526

CHAPTER III

NATURALIZATION AND OTHER TITLES TO CITIZENSHIP OR PROTECTION

FRAUDULENT NATURALIZATION.....	528
§ 228. Municipal Penalties.....	528
§ 229. Presumptions of Fraud.....	529
§ 230. Criteria Applied by Municipal and International Courts.....	532
INTERNATIONAL EFFECTS OF NATURALIZATION.....	533
§ 231. Nature and Effect of Naturalization.....	533
§ 232. Conditions of Recognition.....	535
§ 233. Certain Features of American Naturalization having International Importance.....	536
§ 234. Non-Retroactivity of Naturalization.....	539
§ 235. Protection of Naturalized Citizen in Native Country.....	540
§ 236. Relations with Different Countries.....	543
§ 237. (A) Countries Which Deny the Right of Voluntary Expatriation...	544

	PAGE
§ 238. (B) Countries Which Recognize Foreign Naturalization upon Condition Only.....	546
§ 239. (C) Countries Which Have Concluded Naturalization Treaties with the United States.....	548
§ 240. Germany and Austria-Hungary.....	550
§ 241. Renunciation of Naturalization.....	552
§ 242. Act of March 2, 1907.....	554
DOMICIL AS CONFERRING NATIONAL CHARACTER.....	555
§ 243. Domicil and Nationality.....	555
§ 244. Domicil Neither Confers nor Forfeits Citizenship.....	558
§ 245. Belligerent Domicil.....	559
§ 246. Effect of Domicil before International Tribunals.....	561
EFFECT OF DECLARATION OF INTENTION TO BECOME A CITIZEN.....	565
§ 247. International Effects.....	565
§ 248. Anomalous Position of Declarant.....	567
§ 249. Protection of "Declarants".....	568
DOMICIL PLUS DECLARATION OF INTENTION.....	570
§ 250. Koszta's Case.....	570
§ 251. Erroneous Interpretations.....	572
§ 252. Decisions of United States-Mexican Commission of 1868.....	574
DUAL NATIONALITY.....	575
§ 253. Manner in Which it Arises.....	575
§ 254. The Jus Soli.....	577
§ 255. The Jus Sanguinis.....	578
§ 256. Methods of Avoiding Conflicts.....	578
§ 257. Protection Abroad in Cases of Dual Nationality.....	580
§ 258. Foreign-born American Citizens.....	582
§ 259. Right of Election.....	584
§ 260. Decisions of International Tribunals of Arbitration.....	587
§ 261. Measures to be Adopted to Adjust Conflicts of Nationality.....	590
§ 262. Absence of Nationality.....	591

CHAPTER IV

EFFECT OF VARIOUS LEGAL RELATIONSHIPS

MARRIED WOMEN AND WIDOWS.....	593
§ 263. Effect of Marriage on Citizenship.....	593
§ 264. Foreign-born Wife of American Citizen.....	594
§ 265. Foreign-born Widow of American Citizen.....	598
§ 266. American-born Wife of an Alien.....	601
§ 267. American-born Widow of an Alien.....	604
§ 268. Decisions of International Tribunals of Arbitration.....	605
CHILDREN.....	606
§ 269. Citizenship at Birth.....	606
§ 270. Foreign-born Children of American Citizens.....	608

	PAGE
§ 271. Election of Citizenship under § 6 of Act of 1907	609
§ 272. Citizenship by Naturalization of Parent	611
§ 273. Illegitimate Children	612
PARTNERS	613
§ 274. American Partners Associated with Aliens	613
§ 275. Decisions of International Tribunals of Arbitration	614
§ 276. Surviving Partners	616
CORPORATIONS	617
§ 277. Citizenship of Corporations	617
§ 278. Anglo-American Law	619
§ 279. Diplomatic Protection of American Corporations. Conditions	620
§ 280. Foreign Corporation Substantially Owned by American Citizens	622
§ 281. Rule of International Tribunals	623
§ 282. Effect of Citizenship of Stockholders upon Jurisdiction of International Commissions	625

CHAPTER V

SUCCESSORS IN INTEREST AND BENEFICIAL OWNERS

§ 283. Effect of Citizenship of Derivative Claimants	627
HEIRS	627
§ 284. Citizenship of Decedent and Heir Usually Required	627
§ 285. Decisions of International Tribunals	628
§ 286. Law Governing Distribution of Estate	630
§ 286a. Survivorship of Claims	632
EXECUTORS AND ADMINISTRATORS	633
§ 287. Rules Governing Right of Representation	633
§ 288. Citizenship of Original Claimant Governs Jurisdiction	634
§ 289. Who May Act as Legal Representative	634
ASSIGNEES	636
§ 290. Assignability of Claims	636
§ 291. Assignor and Assignee Must have Same Citizenship	637
§ 292. Special Provisions of Federal Statutes in Certain Cases	638
§ 293. Assignees in Bankruptcy	641
§ 294. Receivers	642
BENEFICIAL OR EQUITABLE OWNERS	642
§ 295. Equitable American Interest Protected	642
§ 296. Creditors	643
§ 297. Mortgagees	645
§ 298. Insurers	646
§ 299. American Insurers of Foreign Property	647
§ 300. Foreign Insurers of American Property	649
§ 301. Provisions of Federal Statutes	650

PART IV

LIMITATIONS ON DIPLOMATIC PROTECTION

CHAPTER I

CONDITIONS PRESCRIBED BY THE CLAIMANT'S OWN GOVERNMENT

	PAGE
§ 302. Obligations of the Person Claiming Protection.....	651
§ 303. Instructions for Claimants against Foreign Governments.....	653
§ 304. Interpretation of the Circular of 1906.....	656
§ 305. Practice of International Tribunals.....	658
CLAIM MUST BE NATIONAL IN ORIGIN.....	660
§ 306. Impossibility of Nationalizing Claim by Naturalization or Assignment.....	660
§ 307. Decisions of International Tribunals of Arbitration.....	662
CITIZENSHIP AT TIME OF PRESENTATION.....	664
§ 308. Decisions of International Tribunals of Arbitration.....	664
§ 309. Claim Must be Continuously National in Ownership.....	666
§ 310. Theory of Indirect Injury to the State. Criticism.....	666
CONSULAR REGISTRATION OF CITIZENS.....	667
§ 311. Its Relation to Protection.....	667
§ 312. Registration in Extraterritorial Countries.....	669
§ 313. Proof of Citizenship Necessary. Consular Regulations.....	669
OTHER CONDITIONS.....	673
§ 314. Fulfillment of Duties of Citizenship.....	673

CHAPTER II

FORFEITURE OF PROTECTION BY ACT OF CITIZEN

EXPATRIATION

§ 315. Recognition as an Individual Right. History in United States....	674
§ 316. Diplomatic Relations with Countries not Recognizing Expatriation as Individual Right.....	677
§ 317. Inconsistencies of Law and Practice with Principles of Act of 1868..	678
§ 318. Expatriation of American Citizen.....	679
§ 319. Methods of Expatriation.....	680
EXPATRIATION—COMPARATIVE LEGISLATION.....	683
§ 320. Types of Legislation.....	683
§ 321. Modes of Expatriation.....	685
§ 322. Effect of Husband's and Father's Expatriation upon Wife and Children	687
§ 323. Repatriation.....	688
IMPLIED RENUNCIATION OF CITIZENSHIP.....	689
§ 324. True Meaning of the Phrase.....	689

	PAGE
§ 325. Acts from Which Renunciation of Citizenship may be Implied	689
(A) EFFECT OF PROLONGED RESIDENCE ABROAD	
§ 326. General Principles	690
§ 327. The Case of Native Citizens	692
§ 328. Practice under the Amended Rules of 1907 and the Circular In- struction of July 26, 1910	695
§ 329. Decisions of International Tribunals of Arbitration	698
§ 330. Case of Naturalized Citizens	701
(B) METHODS OF OVERCOMING PRESUMPTION OF EXPATRIATION	
§ 331. Interpretation and Construction of Departmental Rules	704
§ 332. Rules in the Case of Extraterritorial Countries	706
§ 333. Recent Departmental Ruling Concerning Heritability of Citizen- ship in Extraterritorial American Communities	709
BANISHMENT	710
§ 334. Now Practically Abandoned	710
ACTS WHICH DO NOT EFFECT EXPATRIATION	711
§ 335. Foreign Military Service	711
§ 336. Other Acts	712

CHAPTER III

FORFEITURE OF PROTECTION BY ACT OF CITIZEN—Continued

CENSURABLE CONDUCT OF THE CLAIMANT

§ 337. General Principles. Topical Division	713
INEQUITABLE CONDUCT GENERALLY	714
§ 338. Ex Dolo Malo non Oritur Actio	714
§ 339. Disloyalty and Unneutral Conduct	715
§ 340. Effect of Censurable Conduct in Certain Cases	716
§ 341. Censurable Conduct Extraneous to Injury or Claim	718
CONCEALMENT AND DENIAL OF CITIZENSHIP	720
§ 342. Departmental Rulings	720
§ 343. Decisions of International Tribunals	721
FRAUDULENT AND EXORBITANT CLAIMS	724
§ 344. Claims against United States	724
§ 345. Claims against Foreign Governments	725
EVASION OF NATIONAL DUTIES	728
§ 346. Desertion	728
§ 347. Evasion of Duties of Citizenship Generally	731
BREACH OF LOCAL (FOREIGN) LAW	733
§ 348. Limitations on Diplomatic Protection	733
§ 349. Acquittal of Criminal Charges. International Claim Unusual	736
BREACH OF INTERNATIONAL LAW	737
§ 350. Piracy and Slave-Trade	737
§ 351. Violation of Rights of Belligerents. Contraband, Blockade, etc. . . .	739

	PAGE
BREACH OF NATIONAL LAW.....	745
§ 352. When Protection Forfeited.....	745
§ 353. Waiver of Forfeiture by National Government.....	746
UNLAWFUL TRADE.....	748
§ 354. Trading with the Enemy.....	748
§ 355. Prohibition upon Neutral Vessels. Decisions of International Tribunals.....	752
§ 356. Licenses.....	753
§ 357. Special Cases of Intercourse with Enemies.....	754
UNNEUTRAL CONDUCT AND UNFRIENDLY ACT.....	755
§ 358. Breach of Neutrality.....	755
(a) <i>Privateering</i>	756
§ 359. Decisions of International Tribunals.....	757
(b) <i>Unlawful Expeditions</i>	758
§ 360. Neutrality Acts of the United States.....	758
§ 361. Effect of Participation in Unlawful Expeditions upon Protection...	760
§ 362. Cases before International Tribunals.....	762
§ 363. Executive and Judicial Rulings.....	765
(c) <i>Unneutral Military Service and Other Acts</i>	766
§ 364. Qualified Loss of Protection.....	766
§ 365. Claims for Military and Other Service.....	776
§ 366. Participation in Politics.....	778
§ 367. Unfriendly Acts.....	780
§ 368. Unneutral Supplies and Other Aid.....	783
(d) <i>Aid and Comfort</i>	786
§ 369. Definition of "Aid and Comfort".....	786
§ 370. Acts which do not Constitute "Aid and Comfort".....	790

CHAPTER IV

FORFEITURE OF PROTECTION BY ACT OF CITIZEN—Continued

RENUNCIATION OF PROTECTION

EXPRESS RENUNCIATION BY CONTRACT.....	792
§ 371. The So-called Calvo Clause.....	792
§ 372. Its Incorporation in Concession-Contracts in Latin-America.....	794
§ 373. Its Ineffectiveness in Preventing Interposition. Practice of the United States.....	797
§ 374. Executive Views as to the Renunciation of Protection or Indemnity..	798
§ 375. Decisions of International Tribunals on Effect of Contractual Re- nunciation.....	800
§ 376. The Validity of Calvo Clause Upheld.....	801
§ 377. The Validity of Calvo Clause Denied.....	805
§ 378. Conclusions.....	808
IMPLIED RENUNCIATION OF PROTECTION.....	810

	PAGE
§ 379. Various Acts from which Renunciation is Implied.....	810
§ 380. Effect of Accepting Public Office or Employment Abroad.....	813

CHAPTER V

FORFEITURE OF PROTECTION BY ACT OF CITIZEN—Continued

FAILURE OF PROPER RECOURSE TO JUDICIAL REMEDIES

FAILURE TO EXHAUST LOCAL REMEDIES.....	817
§ 381. Application of General Rule.....	817
§ 382. Position of Latin-America.....	820
§ 383. Qualifications of the Rule. When Unnecessary to Exhaust Local Remedies.....	821
LACHES, LIMITATION AND PRESCRIPTION.....	825
§ 384. Effect of Delay in Presenting Claim.....	825
§ 385. Laches.....	827
§ 386. Limitations.....	828
§ 387. Decisions of International Tribunals.....	829

CHAPTER VI

LIMITATIONS ARISING OUT OF SUBJECT-MATTER AND POLITICAL CONSIDERATIONS

§ 388. Subject-Matter.....	833
§ 389. Political Considerations.....	834

CHAPTER VII

LIMITATIONS ARISING OUT OF MUNICIPAL LEGISLATION OF THE DEFENDANT STATE

§ 390. Originating Conditions.....	836
§ 391. Legislative Limitations upon Diplomatic Protection—Civil War Injuries.....	838
§ 392. Legislative Limitations to Avoid Claims Based Upon Tortious Injuries.....	842
§ 393. Subtle Legislative Measures to Avoid Interposition.....	844
§ 394. Matriculation as Foreigner.....	854
§ 395. Legislative Limitations in Matters of Contractual Claims.....	856
§ 396. Conclusions.....	856
GENERAL CONCLUSIONS.....	861
APPENDIX. GENERAL AND NATIONAL BIBLIOGRAPHIES ON THE LAW OF ALIENS.....	865
INDEX.....	929

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THE
DIPLOMATIC PROTECTION OF CITIZENS
ABROAD

PART I

RELATION BETWEEN STATE AND CITIZEN, BETWEEN STATE AND ALIEN, AND BETWEEN STATE AND STATE

CHAPTER I

INTRODUCTION

§ 1. State and Individual.

The diplomatic protection of citizens abroad is a comparatively modern phenomenon in the evolution of the state, in constitutional and in international law. Not until the legal position of the state toward individuals, both its own citizens and aliens, and of states among themselves, had become clearly defined in modern public law, did diplomatic protection become a factor in international intercourse.

The history of the legal relation between the state and individuals, its own citizens and aliens, is largely a history of the transition from the system of personal laws to the territoriality of law, accompanied both by a growing control of a central power over the individuals within its jurisdiction and by the appearance of certain characteristics, territorial independence and sovereignty, as essential qualifications for admission of a state into the society of states.¹

§ 2. Growth of Territoriality of Law.

The territoriality of law, an accepted phenomenon of modern times, was a matter of slow development. The Roman law was not applicable to foreigners. Strictly speaking, the foreigner was an outlaw. Com-

¹ The growth of the state and of modern political society cannot be here discussed. The subject is ably treated by Edward Jenks in his *History of politics*, London, New York, 1900, and in his *Law and politics in the Middle Ages*, 2nd ed., London, 1913.

merce, custom and religion brought about an amelioration of his harsh condition to the extent of permitting the application of the foreigner's own law in legal relations among foreigners themselves and in certain commercial relations with Roman citizens. Even this privilege, however, was extended only to friendly peoples. The German tribes were more hospitable to the foreigner, although, strictly speaking, he was a person without rights. By being permitted to reside among them if unchallenged by a member of the tribe, the foreigner acquired a precarious measure of protection, usually assumed by the king or leader of the tribe.¹

In the commingling of tribes in the Frankish Empire and in the absence of any centralized or stable legal system or judicial organization previous to the time of Charlemagne, each tribe lived under its own law and the personal rights and acts of the individual and his legal status were regulated and judged according to the code of the tribe or nation to which he belonged.

This system of the application of the personal laws, as they were called, was by no means analogous to the privilege of living under their own law which Rome had extended to certain classes of friendly aliens. In the Frankish Empire, there was an equality between all the personal systems. In Rome, only the Roman law was universal, and its enjoyment was limited to Roman citizens alone. The use of foreign systems was a special concession due to the unwillingness of Rome to permit foreigners to share in the benefits of the Roman civil law. In the Frankish Empire, the various tribes and their members were equal; in Rome the position of the non-Roman was one of legal inferiority and such advantages as he came to enjoy consisted in the removal of restrictions imposed by the Roman law. The Germanic peoples, before their inva-

¹ Bar, L. von, *Theory and practice of private international law* (Gillespie's translation), Edinburgh, 1892, p. 12; Bernheim, A. C., *History of the law of aliens*, New York, 1885, p. 7 *et seq.*, p. 18; Frisch, Hans von, *Das Fremdenrecht*, Berlin, 1910, pp. 5-22. For the legal position of aliens in early law see the following works: Demangeat, Charles, *Histoire de la condition civile des étrangers en France dans l'ancien et dans le nouveau droit*, Paris, 1844; Sapey, C. A., *Les étrangers en France sous l'ancien et le nouveau droit*, Paris, 1843; Catellani, E., *Il diritto internazionale privato e sui recenti progressi*, Torino, 1895, 2nd ed., 13 *et seq.*; Weiss, A., *Traité de droit international privé*, 2nd ed., Paris, 1908, v. 2, chap. 1.

sion of Rome, knew no system of personal laws, for it was their universal custom that the law of the conquering tribe replaced that of the conquered. The master abolished the law of his slave, and substituted his own.¹ The conditions arising out of the conquest of such a cultured people as the Romans changed this custom, and in the coördinate existence of the Roman system and the body of tribal systems the germ was laid for the recognition of the personality of laws.² The Roman law existed side by side with that of the dominant conquering tribe.³

The two great exceptions to the rule of the personality of laws occurred in cases where the person's individual law could not be recognized and those where such recognition was contrary to the public interest. The first exception applied to aliens and non-Christians, aliens being those whose nations were not included under the Empire. As has been observed, aliens had no rights; they were under public protection and governed by the law of their protector. An individual personal law, moreover, could not interfere with public law; so, for example, the criminal law soon became local and territorial.

In the later Middle Ages, various influences led to a transition from the principle of the personality of law to that of the territoriality of law. With the development of agriculture came a greater permanency of habitation on the part of the Germanic nations. The fixed attachment to a city or community, and intermarriage between members of the different Germanic nations, made it difficult, after a generation or two, to keep in mind individual personal laws; so that courts began to apply their own law, derived largely from the capitularies of the Emperor,

¹ Bar, L. von, *op. cit.* 18.

² Continental Legal History Series, v. 1, General survey of events, sources, persons, and movements in continental legal history, Boston, 1912, p. 60 *et seq.*

³ At the present day we may note the survival of the system of personal laws in the fact that Europeans live in various parts of the world (Turkey, China, the Malay peninsula, some of the Barbary States) under their own law, as do the Indians while on their reservations in this country. See also Asser-Rivier, *Eléments de droit international privé*, Paris, 1884, p. 7, footnote. In the conflict of laws there are numerous cases in which a legal relation is judged by the so-called "personal statute," either the law of the domicile or of the nationality of the individual in question, though this is rather an outgrowth of the *jus gentium* of the Romans than an illustration of the modern survival of the personality of laws. See also Savigny, F. C., *A treatise on the conflict of laws*, translation of v. 8 of his *System des heutigen römischen Rechts* (1849) by William Guthrie, Edinburgh, 1880, pp. 58, 60-62.

which applied to all persons within the Empire without discrimination of race or nation. Although local customs continued to prevail, they applied, instead of to distinct individuals, to all those within a certain locality. The church, by its dominance in certain spheres of law, particularly the family relations, helped to substitute legal uniformity for the diversity of personal laws.

Feudalism, however, was the most vital factor in breaking down the principle of personality. With the intermingling of the races under a fixed home life, with the final acceptance of one religion to replace paganism, with the centralization of legal relations around the idea of land ownership, personal systems lost their utility. In most private legal relations one rule had become dominant over the many conflicting rules previously applied. In the field of public law the feudal fief became the unit of administration, and within it all classes of persons having identical rights in land, had identical rights and duties with respect to their lord. Within the various classes of liegemen rights were equal.

These influences ultimately brought about the disappearance of personality as the criterion of the application of law and substituted territoriality and local uniformity, notwithstanding the fact that certain groups, such as the citizens of certain towns, members of certain guilds, and churchmen were accorded special privileges within the territorial limits.¹

In the feudal system we find some of the primary elements of the relation between the state and its citizen and the protective functions of the state. Feudalism embodied the notion of the territoriality of rights with the personal relation between lord and liegeman now known under modern transformations as sovereignty. Although land ownership became an index of rights and duties, thus strengthening the territorial principle, and the oath of personal allegiance established the reciprocal obligations of protection and service between the feudal lord and his liegeman, it is to be noted that the lord's jurisdiction and control over his man did not transcend the boundaries of his fief. It was only with the French Revolution, which emphasized the rights of the individual, both at home and abroad, that a definite practice arose of extending diplomatic protection to citizens abroad.

¹ General survey of continental legal history, 80-83; Savigny, *op. cit.* 63-74.

NATIONALITY

§ 3. Development of Nationality.

The Thirty Years' War was an epoch-making event in the history of international law. It was not merely a great struggle between Protestantism and Roman Catholicism, but from it emerged the principle of territorial independence as opposed to imperialism.¹ The international system of the present day was definitely marked out and the characteristics of the modern state defined. While unequal in power, the states in the system were recognized each as independent, as legally equal, and as exercising exclusive jurisdiction within certain definite territorial limits. The removal of the common superior fostered what had in fact for years been a sense of national independence and national consciousness. Overshadowed for a time by the religious attributes of the Reformation, and obscured by feudal particularism,² nationality emerged at the peace of Westphalia as a phenomenon distinct from religion.

§ 4. Nature of Citizenship.

Citizenship (or nationality) is the status of an individual as subject or citizen in relation to a particular sovereign or state, and signifies membership in an independent political community. It traces its origin to the time when the city was the largest autonomous unit to which the individual was attached and its meaning has expanded with the growth of that unit into the modern state. It involves a legal and political relationship between the state and the citizen, by virtue of which he is endowed with certain qualities distinguishing him from other individuals.³ The conditions on which citizenship shall be acquired and granted, the individuals to whom this status shall be extended, and the rights and obligations incurred by the relationship are fixed by the municipal public law of each state. Al-

¹ Walker, T. A., *A history of the law of nations*, Cambridge, 1899, I, 148 *et seq.*

² Brissaud, J., *A history of French private law*, Boston, 1912, p. 874.

³ Gerber, C. F., *Grundzüge des deutschen Staatsrechts*, Leipzig, 1880, 3rd ed., 229; Morse, A. P., *A treatise on citizenship*, Boston, 1881, pp. x, 4, 36; Foote, J. A., *Foreign and domestic law, Private international jurisprudence*, 4th ed. by Coleman Phillipson, London, 1914, p. 1.

legiance, the tie which binds the citizen to the political group to which he belongs, is due to the state, the juristic personality of the nation.

Citizenship is essentially a personal relationship, as is sovereignty or the supreme legal authority of the state over those whom it controls. The subjects of the state are all those persons over whom it exercises sovereignty, which in constitutional law include not merely citizens, but aliens residing within its territory or otherwise subject to its control. A territory is not in fact an essential element of sovereignty, although international law has arbitrarily conditioned the enjoyment of membership in the international community on the possession of a territory.¹ It is by virtue of the personal relationship involved in sovereignty and citizenship that the state may declare its laws binding on its citizens even when abroad and by virtue of which its obligations to those non-resident citizens continue to exist.²

Jurisdiction, or the right of physical control over persons, has, however, become territorial, and thus it occurs that the laws of the state, while theoretically binding on the subject so far as made applicable to him, are unenforceable beyond the territorial limits of the state, unless accompanied by extraterritorial jurisdiction or enforced by the foreign sovereign by international arrangement.³ In countries in which extraterritorial privileges are enjoyed, both sovereignty and jurisdiction may be exercised beyond the territorial limits, as is illustrated by the

¹ Crane, Robert T., *The state in constitutional and international law*, Baltimore, 1907, p. 69; Hall, *International law*, 6th ed., Oxford, 1909, pp. 17, 19.

² Congress exercises the right to regulate certain acts of United States citizens abroad and attach prescribed consequences to those acts. E. P. Wheeler, *The relation of a citizen in a foreign country*, in 3 A. J. I. L. (Oct. 1909) 871, and cases there cited. In England this right rests on Crown prerogative, acts of Parliament and common law. See Hall, W. E., *Foreign powers and jurisdiction of the British Crown*, Oxford, 1894, pp. 8-13. See also Fiore, P., *Nouveau droit international public* (Antoine's trans.), Paris, 1885, § 644; Lomonaco, G., *Trattato di diritto internazionale pubblico*, Napoli, 1905, p. 166; Martens, F. de, *Traité de droit international*, Paris, 1883, I, 442; Despagnet, Frantz, *Cours de droit international public*, 4th ed., Paris, 1910, p. 467.

³ The notion that citizens, resident abroad, by virtue of their allegiance still fall under the operation of the laws of their national state, is a fallacy often encountered in the writings of publicists. They are subject only to such national laws as the legislature expressly makes binding upon them. See Piggott, *Nationality*, London, 1906, I, 3.

consular courts of various powers of the first class in countries like China and Turkey. The will of the state, therefore, is not merely limited in its expression by its constitution and laws, but its enforcement is limited externally—except for the grace of other states, due to custom or comity—by the territorial boundaries of the state.¹

§ 5. Nature of the Bond.

In pure constitutional theory, citizenship is imposed by the state, by virtue of its sovereignty, on whomsoever it will, and independently of the will of the person. It is not created by or at the consent of the individual.² The theory is limited in its application by the international rule that states permit their subjects to acquire a new citizenship, or rather predicate their recognition of such a change, on the condition that it shall have been a voluntary act of the subject accompanied by an actual change of domicile and political affiliation.

André Weiss, the eminent jurist of Paris, has presented an ingenious and plausible argument to show that citizenship or nationality is contractual in its nature.³ "It is to-day generally recognized," says Weiss, "that the bond of nationality is a contractual one; and that the bond which unites to the state each of its citizens is formed by an agreement of their wills, express or implied." This theory has been severely criticized, among others by Stoerk⁴ and by Piggott,⁵ and it is now considered fallacious. Some modern authors, however, find in the grant of nationality, *i. e.*, naturalization, a public legal act of a bilateral character,⁶ but even these publicists admit that the

¹ W. W. Willoughby in 1 A. J. I. L. (1907) 925; Heilborn, P., *System des Völkerrechts*, Berlin, 1896, p. 75 *et seq.*, and opinions of Gierke, Oertmann, Gerber and Laband there cited.

² Willoughby in 1 A. J. I. L. (1907) 924.

³ *Annuaire de l'Institut de Droit International*, v. 13 (1894), 162 *et seq.* See also Cogordan, *Droit des gens. La nationalité*, 2nd ed., Paris, 1890, § 2.

⁴ Stoerk, F., *Les changements de nationalité et le droit des gens* in 2 R. G. D. I. P. (1895) 273 *et seq.* See also Nys, E., *Le droit international*, 2nd ed., Bruxelles, 1912, II, 257.

⁵ Piggott, F. T., *Nationality*, London, 1906, I, 5-10.

⁶ Laband, Paul, *Das Staatsrecht des deutschen Reichs*, 5th ed., Leipzig, 1911, p. 177; Jellinek, Georg, *System der subjectiven öffentlichen Rechte*, 2nd ed., Tübingen, 1905, p. 198. The majority of publicists deny that the conceptions of private law furnish any analogy to the peculiar relations created by public law. See

relation is not analogous to a private contractual obligation but rather to the contract of adoption in family law.

The relation between the citizen and his state is in fact a relation *sui generis*. Admission into membership in the state and to the status of citizenship is an act of sovereignty. Being neither a contract nor an act of grace, Stoerk has denominated it a sociological fact, a distinguishing mark of the state itself.¹ In discussing expatriation, the United States Supreme Court, on several occasions prior to the expatriation act of July 27, 1868 (R. S. 1999), expressed the opinion that "the doctrine of allegiance . . . rests on the ground of a mutual compact between the government and the citizen or subject, which it is said, cannot be dissolved by either party without the concurrence of the other."²

The theory of a compact in the relation between the state and its citizens has engaged the attention of political philosophers for centuries. It became important in the eighteenth century when some writers in the American colonies, appealing to the Englishman Locke, forcefully advanced the theory that the individual enters the state by voluntary agreement, and may establish the conditions of his membership and the limitations of the power of the state. In France, Montesquieu and Rousseau were its most prominent champions. In arriving at the true legal relation between the state and the individual we are not concerned with either of the political theories (1) that the entire sphere of right of the individual is the product of state concession and permission, or (2) that the state not only creates rights but leaves the individual that measure of liberty which it does not itself require in the interest of the whole.³

Stoerk, Felix, *Zur Methodik des öffentlichen Rechts*, Wien, 1885, and authorities there cited.

¹ Stoerk in 2 R. G. D. I. P. (1895) 288.

² *Inglis v. Sailor's Snug Harbor*, 3 Peters (1830), 124; *Talbot v. Janson*, 3 Dallas (1795), 162. See also cases cited by Wise, J. S., *American citizenship*, Northport, 1906, p. 263. While not a mutual compact, it is true that as a status imposed by the state, citizenship and allegiance could only be renounced when permitted by the state. In most modern states, except Russia and Turkey, municipal legislation has granted the individual this power.

³ On this entire subject see Jellinek, G., *The declaration of the rights of man and of citizens*, New York, 1901 (Max Farrand's translation), 80, 90 and 95.

§ 6. "Temporary Allegiance" of Aliens.

Foreigners within the state owe it a considerable measure of obedience in return for the local protection they receive while residents. This obedience has often been termed temporary and qualified allegiance in contradistinction to the permanent and absolute allegiance owed by the citizen.¹ In truth, it is a misnomer to speak of "temporary allegiance" due by a foreigner. The nature of the foreigner's subjection to the state of his residence was described by Secretary of State Webster in 1851 in his report on Thrasher's case as follows:²

Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native born subject might be, unless his case is varied by some treaty stipulation.

The migration of the citizen of one state to another and his residence in the latter brings about in constitutional theory a double citizenship, of primary and organic nature with respect to his home state and of a temporary and qualified nature with respect to the state of residence. It subjects the individual for different purposes and in different degrees to the sovereignty of two states. The conflicting claims of two or more states to the citizenship and obedience of the same individual have been to a great extent settled by mutual forbearances, although differences in municipal legislation in some instances still give rise to cases of double nationality and even of no nationality (*Heimatlosen*).³

§ 7. Source of Rights of Individual.

Nationality (a less ambiguous term than its synonym, citizenship) is the most important of the three relations in which a person may

¹ Mr Justice Field in *Carlisle v. United States*, 16 Wallace, 147, at 154; adopted by Willoughby in 1 A. J. I. L., 924.

² The works of Daniel Webster, Boston, 1851, VI, 518, at 526, cited also in *Carlisle v. United States*, 16 Wall. 155; see also Mr. Justice Gray in *United States v. Wong Kim Ark*, 169 U. S. 649.

³ Cogordan, *op. cit.*, 11-14.

be subject to the control of a particular state. These three, in the order of the closeness of the bond, are actual residence, domicil, and nationality or citizenship (*Staatsangehörigkeit, nationalité*).¹ Used in the ethnographic sense, a nation is a collection of human beings held together by certain common physical or racial characteristics; used in the legal sense, it denotes a politically united people, and its derivative "nationality" is used to represent the bond which attaches the citizen by certain qualities to the state.² It has already been noted that by virtue of the bond the citizen is provided with certain rights, in particular, political rights, and is charged with the performance of certain duties to his state in return for the benefits of citizenship.³ Stoerk and Oppenheim believe that nationality is a condition precedent to the enjoyment of international rights, a statement which von Bar refutes by showing that *heimatlosen* or those without nationality are entitled to these rights.⁴ International rights are commonly considered to be those which are universally accorded by the national law of all civilized states to individuals within its jurisdiction.

Confusion arises because in the present state of our civilization, the individual, as a human being, is accorded certain fundamental rights by all states professing membership in the international community. In constitutional governments, they have often received the name "rights of man." These rights, uncertain as they are in content, were denominated by Blackstone as the absolute rights of all mankind,—the right to personal security, to personal liberty and to private property.⁵ At one period in the history of law they were known as "natural

¹ Cogordan, *op. cit.*, § 1.

² Bar, *op. cit.*, 111; Stoerk in Holtzendorff's *Handbuch des Völkerrechts*, Berlin, 1885, II, 589-591.

³ Stoerk in Holtzendorff's *Handbuch*, II, 630-636; Heilborn, *op. cit.*, 75 *et seq.*; Oppenheim, *International law*, London, 1912, § 291; Gareis, K. *Institutionen des Völkerrechts*, Giessen, 1901, § 53; Cockburn, Alexander, *Nationality*, London, 1869, p. 186; Nys, E., *op. cit.*, II, 257.

⁴ Stoerk in Holtzendorff's *Handbuch*, II, § 114, p. 589; Oppenheim, *op. cit.*, I, § 291; Bar, *op. cit.*, 111.

⁵ What is regarded as private property may differ from state to state, *e. g.*, slaves were, until recently, property in some states. See *The Amistad*, 15 Pet. 518; *The Creole*, 30 St. Pap. 181-193. These rights may, of course, be forfeited to society by due process of law. See *Kepner v. U. S.*, 195 U. S. 100.

rights," and this conception played a prominent part in justifying the eighteenth century political philosophy which culminated in the French Revolution.¹ These rights, as incidental to natural law, the adherents of which school of legal philosophy were the founders of international law, were logically denominated international rights and sometimes human rights. Whether the recognition of these rights is the result of history and the unconscious growth of law or whether it is the result of conscious legislation,² it is certain that by legislative and judicial declaration certain fundamental rights of the individual in a civilized state have been positivized in the same way that the Roman jurisconsults by their *jus respondendi* positivized the principles of the *jus naturale*.³ These rights, like all rights, are really creations of public sentiment, legally protected interests, which may be expressed either by custom or legislation.

If these rights of a resident alien are violated without proper redress in the state of residence, his home state is warranted by international law in coming to his assistance and interposing diplomatically in his behalf. Reasoning from this fact, many publicists assert that whatever rights the individual has in a state not his own are derived from international law, and are due him by virtue of his nationality. As a matter of fact, the alien derives most of his rights—fundamental or human rights and others—by grant from the territorial legislature, international law fixing a minimum which cannot be overstepped and authorizing certain agencies, usually the national state, to remedy and punish a breach. Whether these "rights of humanity" have their origin in international law, or are merely concomitants of existence in a civilized state, the recognition of which rights a state must show as

¹ For the history of natural rights and the modern theories see Ritchie, D. G., *Natural rights*, London, 1895, chs. 1 and 2. An analysis of the so-called rights is undertaken by Ritchie, ch. 6 *et seq.*

² For a summary account of the history of legal theory and the various schools of legal thought see Borchard, E. M., *Guide to the law and legal literature of Germany*, Washington, 1912, 25 *et seq.*

³ See Muirhead, James, *Historical introduction to the private law of Rome*, London, 1899, 2nd ed., 283. See also 1 *Annuaire of the Institute of Int. Law*, 124. The Supreme Court has recognized the existence of these "fundamental rights" in *Hawaii v. Mankichi*, 190 U. S. 197, 217; *Kepner v. U. S.*, 195 U. S. 100, 123; *Dorr v. U. S.*, 195 U. S. 138, 144.

a condition of membership in the international community, international law, nevertheless, provides them with a definite sanction.¹ This view, it would seem, is confirmed by the fact that where a state under exceptional circumstances disregards certain rights of its own citizens, over whom presumably it has absolute sovereignty, the other states of the family of nations are authorized by international law to intervene on grounds of humanity. When these "human" rights are habitually violated, one or more states may intervene in the name of the society of nations and may take such measures as to substitute at least temporarily, if not permanently, its own sovereignty for that of the state thus controlled.² Whatever the origin, therefore, of the rights of the individual, it seems assured that these essential rights rest upon the ultimate sanction of international law, and will be protected, in last resort, by the most appropriate organ of the international community—the national state of the individual or those states whose interests are most directly affected.

The rights of man as proclaimed by the political philosophers of the American and the French revolution were given positive constitutional expression in France and the United States in 1789,³ and since then have in some form been incorporated in most modern constitu-

¹ See Opinion of Central-American Court of Justice in *Diaz v. Guatemala*, 3 A. J. I. L. (1909) 743.

² Rougier, *La théorie de l'intervention d'humanité* in 17 R. G. D. I. P. (1910), 472. Thus intervention on behalf of co-religionists in the Orient and elsewhere has on numerous occasions been undertaken. Pillet, A., *Principes de droit international privé*, Paris, 1903, p. 171. See the interesting discussion on the abolition of torture in Morocco and European intervention in 17 R. G. D. I. P. (1910) 98. Lawrence (4th ed.) 129, considers interventions on the ground of humanity as outside the ordinary rules of international law.

³ There had been a definite declaration of rights in Virginia in 1776, and the preamble and first paragraph of the Declaration of Independence of July 4, 1776 was in the nature of a declaration of rights. These documents with the French *Déclaration des droits de l'homme et du citoyen* of 1789, as prefixed, with amendments, to several French constitutions, are to be found in the appendix to Ritchie, *op. cit.* See also the first ten amendments to the United States Constitution.

These rights of man had been the subject of discussion by political philosophers of France and England for many years before 1789. They received most forceful expression in the American colonies in numerous pamphlets and tracts, notably those of James Otis and Samuel Adams. See Jellinek, G., *The declaration of the rights of man and of citizens* (translated by M. Farrand), New York, 1901, pp. 80-84.

tions. The municipal law of each state prescribes the manner in which these rights shall be exercised.

Among the rights which have been considered as the rights of man are those to which international lawyers have applied the term "international rights," those general rights which the individual enjoys in every civilized country and which are normally protected by every state of the international family. Fiore¹ enumerates these rights as (1) the right of personal liberty; (2) the right of property; (3) the right to exercise civil rights in conformity with the public law of the state; (4) the right of religious worship. Martens² includes among the imprescriptible rights of man the right to live and procure the means to live; the right to develop intellectual faculties; the freedom of emigration and intercourse; and the right to be respected in person, life, honor, health and property. With this universality of rights of the individual in view, Stoerk and others have coined the term "*Völkerrechtsindigenat*,"³ or, as Bentham has expressed it, "citizen of the world."⁴

§ 8. Nationality as Title to International Redress for Violation of Rights.

The alien, it has been observed, possesses other than human rights. These other rights, *e. g.* copyright, trade-mark rights and commercial rights generally, are derived either from the municipal law of the state of residence or from treaties and conventions concluded for his benefit by his home government. It is only the latter class of rights, which are not enjoyed by aliens generally under the municipal law of the

¹ Fiore, P., *Nouveau dr. int. pub.* (Antoine's trans.) § 697.

² Martens, F. de, *Traité de droit international*, Paris, 1883, I, 440. See also Gareis, *op. cit.* 150. Esmein divides the individual rights recognized by public law into two categories: (1) civil equality, or equal rights and duties, and (2) individual liberty, or the material and moral interests of the individual. See Esmein, *Eléments de dr. const.*, p. 369, cited by Nys, II, 257. See also A. H. Snow in 8 A. J. I. L. (1914) 196.

³ Stoerk in Holtzendorff's *Handbuch*, II, §§ 113-114; Gareis, *op. cit.*, § 53. See Rivier, *Principes*, I, 12, Oppenheim, I, § 291, and Bluntschli, § 23, citing Kant. Triepel and Jellinek consider the concept of *Völkerrechtsindigenat* as worthless. Triepel, H. *Völkerrecht und Landesrecht*, Leipzig, 1899, p. 14; Jellinek, G., *System der subjektiven öffentlichen Rechte*, 2nd ed., 1905, p. 324.

⁴ Extracts printed in Wheaton's *History of the law of nations*, New York, 1845, pp. 329-331.

state of residence, that he may properly be regarded as possessing by virtue of his nationality. The alien thus has rights as an individual and as a member of a definite political group. While, therefore, we must look far beyond his nationality to find a guide to the complete source of the alien's rights, it is nevertheless true that in giving effect to and providing a sanction for his rights, his nationality is the most important factor, for it is by virtue of the bond of nationality that he is entitled to invoke the aid of a specific protector and that a definite member of the international society of states has the right to interpose in his behalf to secure a guarantee for his rights and reparation for their violation. The security of international relations rests largely upon this fact.

§ 9. Position of the Individual in International Law.

It seems unnecessary to review at any length the learned discussions in which particularly the German and Italian writers on international law have engaged in an endeavor to define the exact position of the individual in international law. Using the term "subjects" of law to connote those upon whom the law confers rights and imposes duties, the weight of authority considers states alone as the subjects of international law,¹ and individuals as objects of international law.² This conclusion is based on the theory that international law cannot ascribe rights and duties to individuals directly,³ and that individuals

¹ Heilborn, P., *System*, 58 *et seq.*; Stoerk in Holtzendorff's *Handbuch*, II, §§ 113, 114; Jellinek, *System der subjektiven öff. Rechte*, 2nd ed., 1905, p. 324; Triepel, H., *Völkerrecht u. Landesrecht*, Leipzig, 1899, 20-21; Lomonaco, 218; Diena, G., *Diritto int. pubblico*, Napoli, 1908, p. 242, and in 16 R. G. D. I. P. (1909) 57; Chrétien, *Principes de droit int. pub.*, Paris, 1893, p. 76. See the excellent discussion in Oppenheim, 2nd ed., I, §§ 13, 63 and 288 *et seq.* See also Benjamin, Fritz, *Haftung des Staates aus dem Verschulden seiner Organe nach Völkerrecht*, Breslau, 1909, pp. 14-17; and Marinoni, Mario, *La responsabilità degli stati*, etc., Rome, 1914, pp. 8-10, note.

² Heilborn, *System*, 64 *et seq.*, and in *Handbuch des Völkerrechts*, Stuttgart, 1912, I, 1, § 17; Triepel, *op. cit.*, 21; Diena in 16 R. G. D. I. P. (1909) 58; Oppenheim, I, § 290.

³ Oppenheim, I, § 289 and authorities just cited. Rehm in 1 *Zeitschr. f. Völkerrecht*, 53-55, presents a good argument to show that in matters of contraband carriage, blockade and piracy, international law actually imposes duties of abstention upon individuals, the breach of which is punishable by internationally recognized methods.

cannot invoke for their protection a rule of international law which has not been incorporated in municipal law, *i. e.*, to use Jellinek's term, individuals have no subjective rights based upon international law.¹ Some writers like Heffter, Fiore, Martens, Kaufmann and Bonfils² consider individuals as subjects of international law. This conclusion is based upon different reasons, and finds some support in the following circumstances: (1) by the Washington conventions of 1907, an individual was given the right to sue one of the Central American states before the Court of Justice established at Cartago, and two such suits appear to have been brought; (2) by the unratified Prize Court convention concluded at The Hague in 1907, individuals were given the right to bring a suit in their own names; and (3) by the law of the United States and Great Britain, international law has been accepted as part of the common law,³ and in the United States, treaties are declared to be the supreme law of the land, the rights arising out of which an alien may invoke in municipal courts. Heilborn⁴ regards the first two circumstances as exceptional phenomena proving the general rule, and the third he explains by showing

¹ Jellinek, G., *System*, 2nd ed., 327; Anzilotti in 13 R. G. D. I. P. (1906) 5, 17; Heilborn, *System*, 72; Triepel, *op. cit.*, 328 *et seq.*; Oppenheim, I, § 289. Diena differs from this view and is supported by decisions of the courts of Great Britain and the U. S., to the effect that when municipal law is silent, the individual may invoke a well-established rule of international law for his protection. Taylor, § 103; *The Paquete Habana*, 175 U. S. 677.

² Heffter, *Das europäische Völkerrecht*, 8th ed. by Geffcken, Berlin, 1888, § 14; Fiore, P., *Nouveau dr. int. pub.* (Antoine's ed.) I, § 680; Martens, F., *Traité*, Paris, 1883, §§ 53, 84, 85; Kaufmann, W., *Die Rechtskraft des internationalen Rechtes*, Stuttgart, 1899, 3 *et seq.*; Bonfils-Fauchille, *Manuel de dr. int. pub.*, 6th ed., § 157. See also A. H. Snow in 8 A. J. I. L. (1914) 201 *et seq.* Kaufmann is the only one of these who is altogether clear. Heffter and Martens are quite equivocal. Bluntschli, *Dr. int. cod.*, 5th ed. §§ 22, 23 is difficult to reconcile. See Benjamin, *op. cit.* 14-16.

³ Taylor, § 103; Oppenheim, I, §§ 21, 24, and authorities cited. See a recent work by Piciotto, 1915. See also *The Paquete Habana*, 175 U. S. 677. In the civil law countries generally, the judge is bound by the municipal law of his country, and the alien cannot invoke a rule of international law as the basis of a legal right. See Esteban Gil Borgas in 3 Rev. de derecho y legislación, Caracas (April, 1914), 145, and Diena in 16 R. G. D. I. P. (1909) 57 *et seq.* who believes judges have the power to apply international law.

⁴ In *Handbuch des Völkerrechts*, Stuttgart, 1912, I, part 1, p. 96. See also Oppenheim, I, § 21.

that the courts must by decision embody the international rule in municipal law before individuals may derive rights from it and that in invoking treaty rights the individual in the case posited invokes municipal and not international law.

It would seem that the theory of the majority is correct, namely, that the rules of international law are binding upon and create rights and liabilities between states only. These rules have in view the conduct of states toward aliens, by imposing upon states manifold duties whose object is to assure the protection and well-being of aliens.¹ Individuals indeed are the beneficiaries of the rights and duties which international law ascribes to states. The state fulfills these duties by means of its municipal law, and under this law aliens have subjective rights which they may invoke in municipal courts. But when there has been an alleged violation of international law with respect to a particular alien, the state cannot plead its own municipal law or a decision of its own courts construing a treaty obligation as a defense against an international reclamation of another state. Nor does the alleged violation of international law give rise to any right of the individual to invoke the responsibility of the state, unless the rule violated is also incorporated in the state's municipal law. The remedy, then, is confined to that permitted by municipal law. As the rules of international law and treaties constitute obligations between states,² their violation creates international responsibility, not to the individual, but to the state of which he is a member. This state, in demanding redress, does not represent the individual who has sustained the injury, and does not give effect to his right, but to its own right,³ the right, namely, that its citizen may be treated by other states in the manner prescribed by international law. This legal relation between states, however, may and usually does have as a consequence the indemnification of the individual injured, although he has no legally enforceable right either to the protection of his own state or to the payment of the indemnity when received.

¹ Heilborn, *System*, 64.

² Anzilotti in 13 R. G. D. I. P. (1906), 6, 17; Frisch, *Hans v. Das Fremdenrecht*. Berlin, 1910, p. 131.

³ Heilborn, *System*, 70; Anzilotti, in 13 R. G. D. I. P., 6; Oppenheim, I, § 289.

§ 10. Characteristics of Bond of Nationality.

Four principles dominate the bond of nationality. The first embodies the idea of legal attachment, expressed in former times by membership in a clan or tribe, advancing later into the broader bond of membership in a city, state and nation. This quality Stoerk calls the *civitas* or the quality of belonging to some nation, as every vessel at sea is recognized as belonging to some organized community.¹ The second principle is the *exclusiveness* of nationality. In theory and in aim public law ascribes only one nationality to an individual, though differences in the municipal law of different states have occasionally endowed an individual with plural nationality. The third is the principle of *mutability*, which permits the individual at the present day to change his nationality; and the fourth, the principle of *continuity*, by which the nationality of origin is retained until a new one is acquired. Emigration without naturalization in another state does not break the bond of nationality. Such emigration may by municipal law under certain conditions involve a loss of diplomatic protection, but this is only one of the rights incidental to citizenship.

§ 11. Dual and No Nationality.

The same individual, as has been observed, is sometimes claimed as a citizen by two or more states, due to differences in their municipal legislation as to when citizenship begins and ends. The concurrent claims of the *jus soli* and the *jus sanguinis*, the absolute or conditional refusal of some states, *e. g.*, Russia and Turkey, to permit expatriation, followed nevertheless by the naturalization of their emigrating subjects by other states, or any new naturalization before the bond of allegiance to the original state has been severed, create cases of dual nationality which have given rise to serious conflicts. Again, the imposition by some states of a deprivation of nationality as a penalty for certain acts, or a predication of loss of nationality upon mere residence abroad for a certain period, brings about the equally anomalous situation of an individual without nationality or the *heimatlos*.² By international agreements and municipal law, states

¹ Stoerk in 2 R. G. D. I. P. (1895), 277 *et seq.*

² Weiss in 13 *Annuaire of the Institute of Int. Law*, 174-176, has mentioned eight cases in which conflicts in municipal law have most frequently caused cases of dual

have within the past forty years endeavored to remove these sources of conflict, or at least, by mutual concessions, to agree on the circumstances under which protection shall be accorded and permitted.

§ 12. Citizens in International and in Constitutional Law.

In the international sense the citizens of a state are those individuals over whom the state is admitted by the international community to have primary authority or personal sovereignty. There is, however, a difference between the citizens of international law and those of constitutional law. Leaving aside the broad constitutional principle that the state may impose its citizenship on all those within its sovereignty, there are classes of persons who, while not citizens in constitutional law, are nevertheless subjects of the state or nationals in international law. So, for example, the negroes before the Civil War, the American Indians, and natives of the unincorporated insular possessions, are citizens of the United States in international law, though not constitutionally citizens.¹ Nor are constitutional disabilities attached to age or sex of any international concern.

Again, a person may be a citizen in constitutional law without being a citizen in international law. This case occurs in federal nations like the United States, for example. A person may be a citizen of a State without being a citizen of the United States. Confusion arises because, whereas the status of citizenship is a national grant, the enjoyment of many of its rights is within the jurisdiction of the States, and from the possession of these rights the term "State citizenship" has arisen. To be a citizen of the United States, birth or naturalization in the United States is necessary; to be a citizen of a State, usually only residence is required. Nor is the right to vote a criterion. This right is not granted or guaranteed by the federal Constitution, but is conferred and regulated by the States. This

nationality. See also Cockburn, *op. cit.*, 108, 186, 187. Many publicists consider municipal penalties of loss of nationality as wrong in principle, as they increase the number of persons without nationality.

¹ Wolfman, Nathan, Status of a foreigner who has declared his intention of becoming a citizen of the United States, in 41 American Law Rev. (1907), 499; Coudert, Frederic R., Jr., Our new peoples: citizens, subjects, nationals or aliens, 3 Columbia Law Rev. (1903), 13-32. See also Cogordan, *op. cit.*, § 2.

right is in some states even granted to persons not citizens, either of the State or of the United States.¹ In the British Empire, with its scattered dominions, the term "British citizenship" has received a peculiarly local meaning, not extended, for example, to the natives of India.² In our international use of the term citizenship or nationality we are not concerned with variations in the municipal tests or degrees of citizenship, nor need we be detained by any supposed difference between the terms "subject" and "citizen," the former applying generally to nationals of a state whose government is a monarchy, the latter to those where there is no kingship. The term "nationals" is perhaps the most appropriate, inasmuch as it disregards differences in constitution and form of government.

§ 13. Rights and Duties of State and Citizen Abroad.

As has been observed, the mere separation of the individual from his home soil leaves him still subject to the law of his own state in so far as this has been made applicable to him. This remains so until physically and legally he has become incorporated as a citizen of another state. The continuity of the bond is evidence of the continuation of the reciprocal relation between the state and the citizen. The most important of the rights and duties which exist between the state and its citizen abroad may now be enumerated.

First, self-preservation gives the state the necessary right of calling upon its citizen for military duty, for which purpose the state may recall its absent citizen.³ The state of residence is not, however, obliged to facilitate his return to fulfill the obligations imposed by his national law, though it is bound not to prevent his performance of these duties. The machinery provided for retaining control of the citizen abroad and for assuring him the enjoyment of certain international rights is the consular and diplomatic service, which is governed by such rules of national municipal law as the territorial state,

¹ Van Dyne, F., *Citizenship of the United States*, Rochester, 1904, p. 111.

² Sargant, E. B., *British citizenship*, in "United Empire" (May, 1912), 366, 373.

³ Stoerk in Holtzendorff's *Handbuch*, II, 630 *et seq.*; Bluntschli, *Droit international codifié* (Lardy's) 5th ed., Paris, 1895, § 375; Martens, F., *op. cit.*, 442; Bonfil, H., *Manuel de droit int. public*, 6th ed. (by Fauchille), § 433.

by comity and the force of the principle of the protective surveillance of the national state over its citizens, has permitted it to apply.

Again, the state may impose certain taxes upon the citizen abroad,¹ as has been done by the Federal Income Tax Law of 1913, although international practice usually ascribes the collection of personal taxes to the state of residence.² Questions of double taxation are still an important source of international difficulty.³

These requirements and injunctions of national law are binding between the state and its citizen, and impose duties upon him. The extent to which they are enforceable and their effect is measured by the application of the territorial principle, according to which, except for such concessions as are made by other states, national law loses its coercive force at the frontiers of the territorial dominions of the state. If effect is given by other states to these provisions of national law it is the result of concession in derogation of local territorial jurisdiction, which concessions by custom and comity have become a definite and important part of international law. Nevertheless, the failure by a citizen abroad to obey national law is not without its consequences in the home state. It may be met either immediately by a loss of national protection and sometimes denationalization, or else with penalties inflicted either on his property in the national state or upon rights which he may have retained there, or on his person when he returns.⁴ Similarly, many states punish their citizens, on return, for crimes committed abroad. In a general way, the exercise of this right of the state to punish its delinquent

¹ Rivier, *Principes*, I, 271.

² Stoerk in Holtzendorff's *Handbuch*, II, 631; Bluntschli, *op. cit.*, § 376.

³ Wittmann, Ernö, Double imposts, in 24th Report of the International Law Association (at Portland), London, 1908, pp. 214-229; Bar, *op. cit.*, 245 *et seq.*; Salvioli, G., *Le doppie imposte in diritto internazionale*, Napoli, 1914, 94 p.

⁴ Germany, by the law of July 22, 1913, art. 27, reserves the right to punish with denationalization the failure to heed the summons to return. Sec. 28 provides the same penalty for those who, having entered the service of a foreign state do not, on demand, resign their office. 8 A. J. I. L. (1914) 479. The Hungarian law of Dec. 20, 1879 (Art. 50, *Annuaire de législation étrangère*, 1880, p. 351) makes a similar provision. See also French civil code, Art. 17, § 4, as amended by law of June 26, 1889 and Art. 17, § 3. See also Chrétien, *Principes de droit international public*, Paris, 1893, p. 218.

citizen depends (1) upon the intrinsic importance of the offense,—thus, some states, as, for example, Great Britain and the United States, limit to such punishment the important crimes, such as treason, counterfeiting the national coinage, etc.; (2) on its effect upon his own state and its citizens; and (3) on its punishability by national law and by the *lex loci actus*. If the penalty has already been paid in the place where the crime was committed, the home state will not usually enforce its own penalty, and this is always the case where the crime is against local law alone.¹ As in most cases where the individual is thus subject to the laws of two states, it is by mutual agreement and concession of the respective states that the rights and obligations of the individual are controlled and regulated, the object being to permit him neither to escape obligations nor twice to be subject to them.

The control of the national state is again evidenced in the fact that by the legislation of many countries the acceptance of foreign titles is conditioned upon the consent of the national sovereign.² So, compliance with national law is occasionally necessary to the marriage of citizens abroad. National consent is sometimes a prerequisite to the marriage of military officers, as in Austria, Germany and France.³ Those countries which do not permit divorce, as, *e. g.*, Italy and Brazil, decline to give legal effect to a divorce of their nationals in a state where such divorce is legal.⁴

There is a large field of private international law in which the individual's national law controls his legal relations abroad. Thus, his personal status and his capacity to enter into certain contracts, as, for example, marriage, his right to succession, questions of guardian-

¹ An exhaustive comparative study of the subject of extraterritorial crime, with extracts from the statutes of the more important countries and quotations from the writings of publicists, is to be found in John Bassett Moore's Report on extraterritorial crime and the Cutting case, Washington, 1887, 129 p. See also Chrétien, *op. cit.*, 221.

² Stoerk in Holtzendorff's Handbuch, II, 631; Chrétien, *op. cit.*, 218; Law of Costa Rica, Dec. 20, 1886, Art. 4, Annuaire de législation étrangère, 1887, p. 869.

³ Renton, A. W., and Phillimore, G. G., The comparative law of marriage and divorce, London, 1910, pp. 253-254.

⁴ Buzzati, G. C., Le droit international privé d'après les conventions de la Haye. French translation by Francis Rey, Paris, 1911; Lomonaco, *op. cit.*, 166.

ship and similar matters are largely controlled by his national law.¹ This personal law of the individual, which the principle of territoriality has recognized, is directly connected with the period of the early Middle Ages when the personal law or personal statute controlled the entire legal status of the individual.

Before jurisdiction became national within a politically and geographically defined territory, this personal law was usually the law of the domicile, an inheritance from the Roman law.² The legislation following the French Revolution (for example, Article 3 of the French Code Napoléon) first gave expression to the principle of nationality as controlling the status and capacity of persons. This principle was followed in the Austrian *Allgemeines bürgerliches Gesetzbuch* of 1811 (Article 4), though the capacity of foreigners was still left to the old rule of domicile. The principle of nationality as governing status, capacity and the family relations received its greatest impetus, however, from the Italian school, of which Mancini was the principal apostle, and after adoption in the civil code of Italy, Spain, Germany and to some extent by Switzerland, it has been recognized by almost all the countries of Europe in the Hague Conventions on private international law, resulting from the conferences of 1893, 1894, 1900 and 1904.³ Certain federal states, like Switzerland, still lend emphasis to the principle of domicile as the criterion of status and capacity, as do the United States and Great Britain. Where political nationality is distributed throughout the world among various systems of private law, as for example, British nationality, which exists in Quebec, Scotland and South Africa, this personal law must refer to domicile within the political nationality.

The state in turn undertakes toward its citizens certain duties which

¹ Bluntschli, *op. cit.*, § 379; Rolin, A., *Principes de droit international privé*, Paris, 1897, I, 114.

² Bar, *op. cit.*, 112; see also Savigny, *op. cit.*, 88 *et seq.*

³ The conventions established rules concerning the adjustment of conflicts of law in matters of marriage, divorce and guardianship. With but slight qualifications, the law of the nationality was adopted as the law governing these legal relations. See Meili, F., und Mamelok, A., *Das internationale Privat- und Zivilprozessrecht auf Grund der Haager Konventionen*, Zürich, 1911. See also Westlake, J., *A treatise on private international law*, 4th ed., London, 1905, 27 *et seq.*

are an outgrowth of the relation itself, but which in their exercise are the result of international agreement and concession. The most important of these duties of the state is the obligation to receive its own citizens expelled by other states, or repatriation.¹ This obligation von Bar considers the true kernel of nationality.² Banishment has now been practically abandoned as a penalty against citizens. No state can legally require other states to receive its banished citizen, and if they were to refuse him admission, it would be obliged to accept him again as a resident member of the national community.

The second duty which is imposed upon the state by virtue of the relationship is the protection of the citizen abroad. The security of international intercourse depends upon the fact, recognized by the practice of nations, that states assume toward their citizens the obligation, and possess as against other states the right, of assuring their citizen abroad the exercise and enjoyment of certain legal rights.

PROTECTION ABROAD

§ 14. Diplomatic Protection a Limitation on Territorial Jurisdiction.

The bond of citizenship implies that the state watches over its citizens abroad, and reserves the right to interpose actively in their behalf in an appropriate case. Too severe an assertion of territorial control over them by the state of residence will be met by the emergence of the protective right of the national state, and the potential force of this phenomenon has largely shaped the rights assumed by states over resident aliens.

The principles of territorial jurisdiction and personal sovereignty are mutually corrective forces. An excessive application of the territorial principle is limited by the custom which grants foreign states certain rights over their citizens abroad, sometimes merely the application of foreign law by the local courts, sometimes, in acknowledgment of the principle of protection, a certain amount of jurisdiction. In the Orient and in semi-civilized states this often involves a com-

¹ Martitz, F. von., *Das Recht der Staatsangehörigkeit im internationalen Verkehr* in Hirth's *Annalen des deutschen Reichs*, 1875, p. 794; Stoerk in 2 R. G. D. I. P. (1895), 288; also in Holtzendorff's *Handbuch*, II, § 119; Gareis, *op. cit.*, 163.

² Bar, *op. cit.*, 139.

plete surrender of local jurisdiction in favor of the foreign state, and in states conforming more closely to the highest type of civilized government, it consists in partial derogations from territorial jurisdiction in special classes of cases, *e. g.*, consular jurisdiction in certain commercial disputes and over national merchant vessels.¹ Fundamentally, these concessions are made to assure individuals the most appropriate regulative agency for their legal relations.

It is the obligation of every state to regard the citizens of other states as the subjects of legal rights,² and to furnish the machinery for enforcing the rights granted by municipal law.

When the citizen leaves the national territory he enters the domain of international law. By residence abroad he does not merely carry with him certain rights and duties imposed by the municipal law of his own state, but he enters into a new sphere of mutual rights and obligations between himself as a resident alien and the state of his residence. By receiving the alien upon its territory, the state of residence admits the sovereignty of his national country and recognizes the bond which attaches him to it. A failure on his part to comply with his newly created obligations to the state of residence is met by repression and punishment in the local courts. On the other hand, a failure of the territorial state to fulfill its obligations toward the alien is met by repression on the part of his home state. The extent of these obligations toward the resident alien has been measured by international law and practice, though the very nature of repressive action has permitted the element of physical power and political expediency at times to obscure and even obliterate purely legal rights.

Legally, the measure of the obligation of the state of residence to resident aliens is the measure of the national state's right. The extent of the failure to fulfill the obligation, ordinarily known as the international responsibility of the state, is in exact proportion to the amount of diplomatic pressure or protection which the national state is authorized to interpose.

States are legal persons and the direct subjects of international law. They are admitted into the international community on condition that

¹ Hall, W. E., *Foreign powers and jurisdiction*, Oxford, 1894, pp. 4-6.

² Heilborn, *op. cit.*, 75 *et seq.*

they possess certain essential characteristics, such as a defined territory, independence, etc. In addition, they must manifest their power to exercise jurisdiction effectively and, as will be seen presently, to assure foreigners within it of a minimum of rights. This minimum standard below which a state cannot fall without incurring responsibility to one or more of the other members of the international community has been shaped and established by the advance of civilization and the necessities of modern international intercourse on the part of individuals. The home state of the resident alien is concerned not with the legal legitimacy of a foreign government,¹ but with its actual ability to fulfill the obligations which this international standard imposes upon it. The resident alien does not derive his rights directly from international law, but from the municipal law of the state of residence, though international law imposes upon that state certain obligations which under the sanction of responsibility to the other states of the international community, it is compelled to fulfill. When the local state fails to fulfill these duties, "when it is incapable of ruling, or rules with patent injustice," the right of diplomatic protection inures to those states whose citizens have been injured by the governmental delinquency.²

International law recognizes on the part of each member of the family of nations certain norms or attributes of government for the purpose of assuring the rights of the individual. The independence of states, with the right of administering law and justice uncontrolled by other states, is one of the norms by which this end is attained. In countries which habitually maintain effective government, the protective function of the national government of a resident alien is usually limited to calling the attention of the local government to the performance of its international duty. The right, however, is always reserved, and in the case of less stable and well-ordered governments frequently exercised, of taking more effective measures to secure to

¹ The assassination of the King of Serbia by certain nobles and of President Madero by rebels was of no special concern for international law, in view of the immediate establishment of a government having the power to fulfill the international obligations of the state.

² Hall, W. E., *Foreign powers and jurisdiction*, 4; Bluntschli, *op. cit.*, § 380.

their citizens abroad a measure of fair treatment conforming to the international standard of justice. While the right of every state to exercise sovereignty and jurisdiction within its territory over all persons within it is recognized, foreign nations retain over their citizens abroad a protective surveillance to see that their rights as individuals and as nationals receive the just measure of recognition established by the principles of municipal and international law.¹ Non-interposition is the rule only so long as states are careful to observe their international duties. Diplomatic protection, therefore, is a complementary or reserved right invoked only when the state of residence fails to conform with this international standard.

States normally avoid the two extremes (1) of leaving their citizens entirely unprotected and (2) of improperly impairing the administration of justice in a foreign country by immediately interposing in their behalf before local remedies have been exhausted. When interposition is immediate, it is justified by the allegation that the local administration of justice was not up to the international standard of civilized justice which requires forbearance of diplomatic action.

The rules of international law in this matter fall with particular severity upon those countries where law and administration frequently deviate from and fall below this standard; for the fact that their own citizens can be compelled to accept such maladministration is not a criterion for the measure of treatment which the alien can demand, and international practice seems to have denied these countries the right to avail themselves of the usual defense that the alien is given the benefit of the same laws, the same administration, and the same protection as the national.

The broad principle of international law that when an individual establishes himself in a foreign state he renders himself subject to the territorial jurisdiction of that state and must normally accept the institutions which the inhabitants of the state find suitable to themselves, must be viewed in its relation to the complementary principle that the individual in question still owes allegiance to his own state

¹ Address before the American Society of International Law, April 29, 1910, *Proceedings*, 46; Heilborn, *op. cit.*, 64 *et seq.*; Pillet, A., *Recherches sur les droits fondamentaux des états*, Paris, 1899, p. 19 *et seq.*, particularly at p. 28.

and will be protected by that state when his rights, as measured not necessarily and finally by the local, but by the international, standard are invaded.

§ 15. Right and Duty of Protection.

Many writers consider diplomatic protection a duty of the state,¹ as well as a right. If it is a duty internationally, it is only a moral and not a legal duty, for there is no means of enforcing its fulfillment. Inasmuch as the state may determine in its discretion whether the injury to the citizen is sufficiently serious to warrant or whether political expediency justifies the exercise of the protective forces of the collectivity in his behalf,²—for the interests of the majority cannot be sacrificed—it is clear that by international law there is no legal duty incumbent upon the state to extend diplomatic protection.³ Whether such a duty exists toward the citizen is a matter of municipal law of his own country,⁴ the general rule being that even under municipal law the state is under no legal duty to extend diplomatic protection.⁵

The state has, however, in international law, a right as against other states to protect its citizen abroad. This international right is universally admitted, and attempts to limit it by the municipal legislation of defendant states have not been successful.⁶ The individual is also often said to have a right to the protection of his government.⁷ This is, however, a moral rather than a legal right, for it is unenforce-

¹ Martens, *Traité*, 444 and as arbitrator in *Costa Rica Packet* (Gt. Brit.) v. Netherlands, May 16, 1895, Moore's Arb. 4952. Lomonaco, *op. cit.*, 212, calls it "always a sacred duty." Grotius, II, ch. XXV, §§ 1 and 2; Vattel, I, ch. II, §§ 13-16; Fiore, *Dir. int. codificato*, 5th ed., § 531 note; Pradier-Fodéré, § 402.

² *Infra*, § 143.

³ Oppenheim, I, § 319; Heilborn, *System*, 70.

⁴ Diena, *Dir. int. pubblico*, Napoli, 1908, p. 258; Heilborn, *System*, 70. Mr. Frelinghuysen, Sec'y of State, to Mr. Soteldo, April 4, 1884, For. Rel. 1884, 601.

⁵ Certain German writers, basing their contention upon art. 3, § 6 of the Constitution of the German Empire, which provides: "Against foreign states all Germans equally have the right to demand the protection of the Empire," assert that there is a municipal duty to protect. Seydel, *Bayerisches Staatsrecht*, I, p. 300, note 43; Grabowsky in 12 *Verwaltungsarchiv* (1904), 232 *et seq.*

⁶ *Infra*, § 390 *et seq.*

⁷ *Infra*, § 138.

able by legal methods.¹ Even under the German constitution, which expressly accords German subjects the right to protection, no legal remedy or means of enforcing the right has been granted.²

THE PROTECTIVE FUNCTION

§ 16. Political Philosophy. Function of the State.

In arriving at the basis for the external activity of the state in protecting citizens abroad, we are led into the field of the true function of the state. Being concerned primarily with international law, or the material and external sides of state activity, we can avoid all abstract philosophy, with the attempt to bring the meaning of the term "state" into harmony with a general theory of the universe.³

From the beginning of civilization, the relation between the state and the individual and the proper sphere of the activity of each have been discussed by political philosophers. Under the ancient theory of the state, especially among the Greeks, the state was regarded as the ultimate aim of human life, an end in itself.⁴ Individuals appeared only as parts of the state; their rights and welfare were recognized only to the extent that it was serviceable to the state. By the time of the Romans, with its absence of political freedom but strong protection for private rights, a more just sense of the relation between state and individual obtained, at least so far as the sphere of law is concerned. The Kantian theory of the *Rechtsstaat* considered the sole duty of the state the maintenance of the legal security of each individual. This attempt to narrow the sphere of governmental activity was adopted by the orthodox political economy which reduced the function of the state to the minimum of maintaining security.⁵ A

¹ *I. e.*, the individual has no legal claim to protection. Rivier, *Principes*, I, 272.

² Seydel and Grabowsky, *op. cit.*, consider it a subjective right, *i. e.*, that the individual has a legal claim to protection. Jellinek contests this view, asserting that the right to protection is a reflex of an objective right, *i. e.*, the individual has no formal legal claim to it. Jellinek, *System*, 2nd ed., 1905, pp. 119-120. Laband states, rather equivocally, that protection by the state is not a favor or a gratuity, but that the individual's right is recognized. *Deutsches Staatsrecht*, I, 139, cited by Jellinek, 119.

³ McKechnie, S. W., *The state and the individual*, Glasgow, 1896, p. 52.

⁴ Bluntschli, J. K., *The theory of the state*, Oxford, 1898, p. 305.

⁵ Duguit, L., *Etudes de droit public*. 1. *L'état, le droit objectif et la loi positive*,

more modern theory, entirely individualistic and utilitarian, supported strongly by Macaulay, Bentham and John Stuart Mill, regarded the state as a means only to insure and increase the sum of private happiness.¹

The one-sidedness of each of these views has become more evident with the growth of social legislation during the past generation. The state is not merely an end in itself, nor only a means to secure individual welfare. Just as the nation is something more than a sum of the individuals belonging to it, so the national welfare is more than the sum of individual welfare. National welfare and individual welfare are indeed intimately bound together. In an impairment of individual rights, the state, the social solidarity, is affected;² yet where, in a particular case, the redress of the individual wrong would involve too great a social cost, it may be overlooked, and the measurement of the balance of advantages is in the discretion of the government.

The assurance of the welfare of individuals, therefore, is a primary function of the state, accomplished internally by the agency of municipal public law, and externally through the instrumentalities of international law and diplomacy. The establishment of the machinery to insure this object constitutes an essential function of state activity—within, protecting every member of society from injustice or oppression by every other member; without, protecting its citizens from violence and oppression by other states. Authorities differ in giving expression to this function of the state, but modern publicists agree that it finds its basis in the nature of the state and in the doctrine of Locke that “the end of government is the good of mankind.”³

Paris, 1901, p. 288. See the theories of Kant and Humboldt as discussed in Bluntschli, *op. cit.*, 68.

¹ McKechnie, *op. cit.*, 77; Ritchie, *op. cit.*, 87.

² Duguit, *op. cit.*, 290.

³ McKechnie, *op. cit.*, 74; Bluntschli, *op. cit.*, 319 *et seq.* For an account of the contributions of a long line of publicists to political theory and philosophy, especially as involved in the relation of the state to the individual, and the struggle between authority and liberty, see the works of McKechnie, Bluntschli, and Duguit cited above, and Yeaman, G. H., *The study of government*, Boston, 1871, and Leroy-Beaulieu, P., *The modern state in relation to society and the individual*, London, 1891.

International lawyers, unwilling to indulge in philosophical speculation as to the relation between the state and the individual, assert that the final mission of the state and the aim of international organization culminates in the guaranty of the collective security of the nation and the personal security of the individual and of his rights, and the promotion of social and individual welfare.¹ Diplomatic protection, therefore, as a governmental function to achieve security and justice, results from the very nature of the state.² It is entirely consistent with the principle of independence, when it is recalled that the latter, as an attribute of states, is only recognized by international law on the theory that it is the best means of accomplishing state functions. Its basis being practical, international law permits it to be set aside, when it is misapplied, by the diplomatic interposition of those states whose interests, through their citizens, have been prejudiced by the delinquency. Diplomatic protection thus conforms with the aim of international organization—the advancement and perfection of those rights which the modern development of international law, by custom and treaty, has recognized as inherent in the individual.

¹ See, *e. g.*, Martens, *op. cit.*, § 85; Holtzendorff's Handbuch, I, § 15; and Huber, Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts u. Staatengesellschaft in 4 Jahrbuch des öffentlichen Rechts (1910), 56-134; Vattel, Chitty-Ingraham ed., Phila., 1855, Prelimin. § 22; Bk. I, ch. II, §§ 13-16; see also A. H. Snow, "The American philosophy of government", in 8 A. J. I. L. (1914), 191, 200 and Hobhouse, Leonard T., Social evolution and political theory, New York, 1911, Chap. IX; Wilson, Roland K., The province of the state, London, 1911, Chaps. I and II.

² Pillet, A., Le droit international public, ses éléments constitutifs, domaine et objet, 1 R. G. D. I. P. (1894), 5.

CHAPTER II

THE ALIEN

§ 17. Historical Development of Legal Position of Alien

The legal position of the alien has in the progress of time advanced from that of complete outlawry, in the days of early Rome and the Germanic tribes, to that of practical assimilation with nationals, at the present time. In the Twelve Tables of Rome, the alien and enemy were classed together, the word *hostis* being used interchangeably to designate both. Only the Roman citizen had rights recognized in law. When Rome became a conquering and commercial nation, certain classes of foreigners were admitted into friendly relations with that government. By special treaty, or through hospitality, or the necessities of commerce, these aliens were accorded the benefits of the so-called *jus gentium*, or the law common to all mankind, for the *jus civile* was reserved exclusively for Roman citizens. The barbarians, or those with whom the Empire had no friendly relations, had no rights at all.¹ The *Prætor Peregrinus*, first appointed in 242 B. C. was the special judge of the legal relations of aliens, either among themselves or with Romans, and he applied the *jus gentium*.

The Germanic tribes, in the early period, were hardly more hospitable to the alien than were the Twelve Tables of the Romans. Their later wanderings, however, brought them into constant relations with foreigners, and while rights of foreigners were not recognized, the practice of hospitality ameliorated the alien's harsh position of outlawry.

¹ Bernheim, A. C., The history of the law of aliens, New York, 1885, p. 7 *et seq.* For the history of the law of aliens see also the works of Frisch, Hans von, Das Fremdenrecht, Berlin, 1910, pp. 5-22; Demangeat, Charles, Histoire de la condition civile des étrangers en France dans l'ancien et dans le nouveau droit, Paris, 1844; Sapey, C. A., Les étrangers en France sous l'ancien et le nouveau droit, Paris, 1843; Weiss, A., Traité de droit international privé, 2nd ed., Paris, 1908, v. 2, chap. 1; Pierantoni, A., Trattato di diritto internazionale, Rome, 1881, v. 1. The etymology of the words used to describe aliens is discussed in Bernheim, 20-21.

In the feudal period, when the principles of unchallenged residence of an alien for a certain period (generally a year and a day), and voluntary subjection to the protecting patronage, first of a member of the tribe and later of the feudal lord, had become recognized institutions, the disabilities of the alien became more clearly defined. The disabilities and restrictions differed in degree in different baronies, although based on similar principles. In the restriction of personal liberty, the "*jus wildfangiatus*," the exactions ranged from the imposition of complete serfdom, or a prohibition to leave the domain or to marry without the lord's consent, to almost complete personal freedom, subject to payment of taxes and fines.¹ The principle of the so-called *droit d'aubaine* (literally translated, "right of the foreigner") was in force throughout the feudal period. Properly speaking, this involved the right of the *lord* or *fiscus* to take the estate of the foreigner at his death, and in application consisted of the disability of the foreigner to take by succession or to become a testator, either unconditionally, or subject to the payment of certain sums to the lord.² Political rights there were none. The principal difference between the person who was born in the fief or race and the stranger who settled there was in the immunity of the former from the *droit d'aubaine*. Until the time when political rights were conceded, the essential difference between nationality and domicil was slight. As has been observed, nationality, as the bond through which the citizen is attached to his state, securing through his state the recognition and the ultimate enforcement of rights abroad, did not clearly emerge as a legal relation with definite individual rights until the period of the French revolution.

From the fifteenth to the nineteenth centuries, many of the feudal disabilities of aliens were retained in principle though reduced in severity of application. It will not be feasible to enter into any detailed account of the degrees of alienage, nor of the various disabilities to which aliens were subjected.³ The most important were the *droit d'aubaine* and the somewhat less onerous *jus detractus* or *droit de dé-*

¹ Bernheim, *op. cit.*, 35, 44.

² Bernheim, *op. cit.*, 37, 46; Frisch, *op. cit.*, 22 *et seq.*

³ See Bernheim, *op. cit.*, 41, 49.

traction, a reduction or tax on property first applied in Germany on property which a German resident of one province acquired in and removed from another province. It applied at first not to all foreigners, but only to persons belonging to different provinces of the same nation. By the eighteenth century, it had become a widespread institution in Europe, and applied to all foreigners. The alien, moreover, was incapable of taking *ab intestato*, nor could he become a testator. He was also subjected to various discriminations in the matter of civil and criminal procedure.

In England, the feudal period was of briefer duration than on the Continent. The *droit d'aubaine* did not ripen into a legal institution, nor was the alien protected by the sovereign.¹ Statutes passed from time to time removed the more onerous of the disabilities of the alien. Merchant aliens who were always favored by English law received by license a limited right to reside and trade in England, subject to payments of various kinds.² In the course of time the privileges of alien merchants were enlarged and extended to other aliens as well. Curiously, however, the feudal notions of real property, the ownership of which involved an oath of allegiance, which of course could not be taken by an alien, prevailed in England up to 1870, when by the act of 33 Vict. c. 14, aliens were first rendered capable of taking title in fee to real property.³

With the growth and necessities of commerce and the more frequent intercourse with aliens, combined with the enlightened views of individual rights which the French Revolution brought in its train, the more onerous of the disabilities of aliens, principally the *droit d'aubaine* and the *droit de détraction*, were gradually abolished by treaty and statute, so that at the present time, in his private relations, the legal position of the alien is practically the same as that of the

¹ Bernheim, *op. cit.*, 51 *et seq.*; Hansard, Geo., Treatise on the law relating to aliens and denization and naturalization, London, 1844; La Baron, F. A., Code des étrangers, London, 1849; Henriques, H. S. Q., The law of aliens and naturalization, London, 1906, 1 *et seq.*

² Walford, C., A review of the early laws regulating the privileges of foreign merchants in 9th Annual Report (1881) of the Asso. for the Reform and Codification of the Law of Nations, 198-224.

³ Bernheim, *op. cit.*, 124 *et seq.*; Henriques, *op. cit.*, 3-6.

national. Minor disabilities of various kinds have in different places survived, as, for example, the prohibitions to hold real property, or to convey an indefeasible title by will, which still exist in various states of the United States; certain restrictions as to the admission of undesirable classes due to social and economic reasons; and various procedural discriminations intended as a protection to the national, as the security for costs (*cautio judicatum solvi*) required of the alien plaintiff.¹ These disabilities differ in detail from country to country. They will be considered presently in the discussion of the position of the alien in international law.

§ 18. Relation of Law of Aliens to Different Branches of Law.

The law of aliens enters the domain both of public and private international law. The latter records the rights recognized and denied by positive municipal law; the former controls and criticizes the municipal grant or refusal of these rights. The responsibility of the state toward individuals, both nationals and aliens, is in first instance a matter of municipal law. To establish the extent of this responsibility, or the state's failure in a given case to fulfill its international duty, the legal position of the alien in municipal law must first be determined.

§ 19. Position of Alien in Municipal Law.

The alien in law occupies a position between two extremes—the one a barbaric exclusion of all aliens, the other, a complete equality of nationals and aliens. The first extreme, complete exclusion, is no longer compatible with the existence of the state as a member of the society of nations. Continental writers base the custom of international intercourse on the so-called right of each state to enter into commercial intercourse with the other states of the international community. Anglo-American writers, on the other hand, find no such right to exist apart from treaty.² A few continental publicists admit that the duty

¹ Beale, Jos. H., The jurisdiction of courts over foreigners in 26 Harvard Law Rev. (Jan., 1913), 193, 196.

² Westlake, I (2nd ed.), 217; Oppenheim, I (2nd ed.), 199; Woolsey, Introduction (1872), § 25.

of the state to enter into commercial relations is not absolute, and agree that a state may impose prohibitive customs tariffs or prevent export by a burdensome tax, *e. g.*, the prohibitive tax on occasion assessed on the export of Brazilian coffee. As a practical matter, it is within the sovereign power of a state to isolate itself (as was done within the last century by China, Japan, Paraguay and Argentine), though this isolation may be inconsistent with membership in the family of nations.¹ Practically all of the civilized states have now within definite limits granted a right of residence and travel to unobjectionable foreigners and accorded them a wide range of incidental rights. The universality of the right of sojourn granted to foreigners affords some justification for the continental theory that there is a right of international intercourse which these treaties merely confirm, define and regulate. On the other hand, the recognized inherent power of a state to exclude foreigners, which, however, is now exercised only against certain classes of undesirable aliens, lends direct support of the Anglo-American view that apart from treaty and concession there is no right of international intercourse—notwithstanding the fact that without such intercourse international existence would be impossible.² At the present day the right of admission and sojourn on the part of unobjectionable aliens is almost universally recognized. Qualifications of the right, which are to be found in the possibilities of exclusion, expulsion and the fixing of conditions of sojourn by the state, must in practice be based upon reasonable grounds.

The legal position of aliens is fixed by municipal law, but international law and the obligations of the state toward the other states of the international community, have imposed certain restrictions upon the freedom of the legislator and territorial sovereign.³ Another effective agency of control—aside from extraterritoriality—has been the fact that the measure of a nation's right to require a certain standard of treatment for its subjects abroad constitutes its own standard for the treatment of aliens. The present inquiry, therefore, is directed toward

¹ Despagnet, F., *Cours de droit int. public*, 4th ed., 236, and authorities there cited.

² Charles Earl in *Proceedings of the Amer. Society of Int. Law*, 1911, p. 82.

³ Despagnet, F., *op. cit.*, § 334; Rolin, A., *Principes du droit int. privé*, I, Introduction.

establishing the minimum of rights which the state must accord the alien and the maximum power of control over him—a minimum below which it cannot descend and a practical maximum which it cannot transcend without violating the international standard of right of the alien and duty of the state, and incurring responsibility to his national government.

§ 20. Sources of the Law of Aliens.

Before undertaking this examination it will first be desirable to ascertain the sources of the law of aliens. Treaties are the first source—usually called in Europe treaties of establishment or commercial treaties, and in the United States treaties of commerce and navigation. The questions dealt with in these treaties, which form part of the municipal law of states, differ with the degree of culture and civilization of the contracting parties. The higher a state in culture, the more special the topics mentioned in the treaties, for the general principles governing the treatment of aliens, *e. g.*, protection of life, liberty and property, are recognized by all civilized states. These principles are either embodied in the constitutions or are considered so fundamental that no express declaration or guaranty is required. In matters of private law the treaties contain but few provisions. The rule is generally recognized that the alien and the national are practically assimilated. In treaties between states of a different standard of culture, or fundamentally different in morals or religion, there is usually a detailed expression of every right of the alien, very little being taken for granted. Thus the treaties with the Balkan states are more detailed in their specification of treatment than those among the larger European states.¹

The second source of law governing aliens is municipal legislation, which may be divided into two categories: first, general legislation, which affects national and alien alike, or such legislation from the force of which the alien is not expressly excluded, and secondly, special statutes concerning aliens, which are found in a great many countries and particularly in the countries of Latin America. These statutes have no application to the nationals of the state. Among these special statutes are the laws governing exclusion, expulsion and extradition,

¹ Frisch, *op. cit.*, 92 *et seq.*

which usually prescribe limits to and define the exercise of the right which the state by general international law possesses.¹

MINIMUM OF RIGHTS DUE TO ALIENS

§ 21. Method of Establishing Minimum.

The establishment of the limit of rights which the state must grant the alien is the result of the operation of custom and treaty, and is supported by the right of protection of the alien's national state. This limit has been fixed along certain broad lines by treaties and international practice. It has secured to the alien a certain minimum of rights necessary to the enjoyment of life, liberty and property, and has so controlled the arbitrary action of the state. Thus, for example, it prevents the territorial courts from declining to take jurisdiction of litigation between aliens, or the confiscation of the property of an alien who by war has become an alien enemy, or the forbidding of the alien's right of succession to property.² Nor can a state deprive the alien of the right to appeal to the diplomatic protection of his own government if the state violates this minimum of rights.

International law is concerned not with the specific provisions of the municipal legislation of states in the matter of aliens, but with the establishment of a somewhat indefinite standard of treatment which the state cannot violate without incurring international responsibility. The state's liberty of action, therefore, is limited by the right of other states to be assured that a certain minimum in this respect will not be overstepped.³ A stipulation in treaties or municipal statutes to the effect that the state is not responsible to aliens to any greater extent than to nationals has never prevented international claims where the minimum has been considered as violated, nor can the state's international obligations be avoided or reduced by provisions of municipal law, or by the fact that it violates the rights of its own citizens.⁴

¹ Mr. Brown's view as to the relation between international and municipal law in the rules governing aliens, and the prominence given to treaties as a limitation upon territorial jurisdiction is opposed to modern tendencies and theories of municipal law. See chap. V of Brown, Philip M., *Foreigners in Turkey*, Princeton, 1914.

² Pillet, A., *Principes de droit int. privé*, Paris, 1903, p. 194.

³ Pillet, 169 *et seq.*

⁴ See Morse, *Citizenship*, § 79, presenting a forceful account (from McCarthy) of Palmerston's views. Boeck in 20 R. G. D. I. P. (1913), 366, 371.

The obligation of "special protection", often guaranteed in treaties, merely places aliens upon an equality with citizens, and is not an insurance against all injury. In a well-reasoned opinion on a claim arising out of injuries sustained by a Mexican citizen during the Civil War in the United States, Commissioner Wadsworth of the 1868 commission stated that "special protection" has been given when a government has done all in its power to put down a rebellion and enforce the law.¹ Hall aptly remarks² that a government cannot be required to provide itself with the most efficient means possible for the purpose of protecting aliens, nor is it bound to alter its form of administration to give the "highest possible" protection to the interests of foreign states. The guarantee of "equal protection" sometimes found in treaties does not confer the same substantive rights as are granted to nationals, but only assures full remedial processes for the protection of such rights as are granted to the alien.

§ 22. Recognition of Legal Personality.

Any attempt to define this minimum is fraught with some danger, inasmuch as it varies from state to state. In modern practice, it may be said that the first obligation of the state is the recognition of the alien's legal personality and with it, the national allegiance which binds him to his own country. In the duties which the state may impose on the alien it is limited by the obligations resulting from this bond of nationality. The state cannot compel the alien to renounce his nationality or the rights flowing from it. On the other hand, it has been noted that in the matter of status and capacity, the state (among the countries of Europe) applies his national law as his personal statute. The modern tendency is to bring about an approximation of the alien to the national in the enjoyment of civil rights. The term "civil rights", while somewhat vague in meaning, may in its broadest interpretation be regarded as including all rights not political, and embraces practically all the rights now accorded to aliens by the legislation of the more civilized states.

¹ *Prats (Mex.) v. U. S.*, July 4, 1868, *Moore's Arb.* 2888, 2889. See also *Baldwin (U. S.) v. Mexico*, Apr. 11, 1839, *ibid.* 2859-2866.

² Hall, 4th ed., 230.

§ 23. Status of Foreign Corporations.

There is more uncertainty as to the extent of the obligation to recognize the legal capacity of foreign corporations. Two systems have been in vogue, the one restrictive, which gives a foreign corporation few if any rights and scarcely even recognizes its civil personality, the other liberal, which grants a foreign corporation, within certain specified limitations, the same rights as a natural person, its civil personality being fully recognized.

The restrictive system, supported vigorously by Laurent¹ and his school, is founded upon the Roman "fiction" theory of the nature of juridical personality. The corporation is considered as having an existence only in the territory which has given it legal birth, and recognition of its personality abroad is deemed to require an express act of the local sovereign power, a decree, a statute or a treaty. The fallacies of this system, which with the necessities of modern international commercial relations is rapidly being discarded, consist in overemphasis of the fiction theory of the corporation, and a failure to distinguish between civil and functional capacity.

A corporation, certainly a commercial corporation, is composed of human beings and has a real personality, which is a reality in every state. Its civil capacity, consisting of its right to sue and be sued, to enter into contracts and own property, is essential to its existence, and may be recognized quite apart from any permission to transact business or fulfill its functions. With these facts in mind, the liberal system founds its doctrine upon an assimilation between foreign corporations and natural persons. The corporation's civil capacity and status are governed by its personal law and only its functional capacity is under the control and regulation of the territorial state. This control is limited to those relations of the corporation which concern the citizens of the state, its public policy, or the interests of third parties. Thus, all questions of internal management are matters of personal law and are free from interference by the territorial state. The func-

¹ Laurent, *Droit civil international*, IV, 119 *et seq.*; Taney, Ch. J., in *The Bank of Augusta v. Earle*, 13 Peters, 519 is sometimes (correctly, it is believed) cited in support of this view. See also the agreement of June 25, 1904 between the United States and Russia recognizing the civil capacity of corporations, Malloy's *Treaties*, 1910, II, 1534.

tional capacity of a corporation is limited by its charter and the law of the state where it transacts business.

At the present day, practically all states recognize the civil capacity of foreign corporations as they do that of natural persons. With the growth of commerce, local limitations on functional capacity are gradually being removed, either by statute or treaty, those that still exist being dictated by interests of public policy. Foreign corporations, like aliens generally, are subject to local regulations of registration and other provisions of penal and police laws.¹

§ 24. Other Rights of the Alien.

Assuming that the alien has not fallen within the excluded classes and that by treaty or by legislation his right to admission is recognized, the state, it would appear, must grant him in addition rights of sojourn and trade. Some continental writers reduce these into, first, the right of international communication; and second, the right of circulation and residence.² The right of communication implies the use of the mails, transportation facilities, secrecy of correspondence, etc. The right of circulation and residence is subject to the requirement of passports and the possibility of expulsion, should the alien's presence become a menace to the public interests of the state. From the rights of residence and circulation spring the right to security of person and property, always subject, however, to the penal laws and local ordinances.

"Civil rights" being a term of uncertain definition, numerous publicists have adopted a category of rights, which they call public rights, the

¹ This important subject, the status of foreign corporations, cannot here be treated exhaustively. Full discussions will be found in the excellent monograph of Edward H. Young, *Foreign companies and other corporations*, Cambridge, 1912, and particularly in his article: *Status of foreign corporations and the legislature*, 23 *Law Quarterly Review* (1907), 151-164, 290-303. See also Pillet, A., *Des personnes morales en droit international privé*, Paris, 1914; Haladjian, B., *Des personnes morales étrangères*, Paris, 1901; and Mamelok, A., *Die juristische Person im internationalen Privatrecht*, Zurich, 1900, and the works cited in the general and national bibliographies in the Appendix, *infra*, especially the works by Diena, *Diritto commerciale internazionale*, I, p. 229 *et seq.*, Bar, *op. cit.*, 227 *et seq.*; Dicey, *op. cit.*, 485, and for American cases, 487-489; Pillet, *op. cit.*, 181 *et seq.*; Moore's Dig., IV, 19 and *Annuaire of the Institute of Int. Law*, v. XI (1891 session), 171, and for public and quasi-public corporations, v. XVI (1897 session), 279 *et seq.*

² Pillet, *op. cit.*, 186; see also Baty, T., *International law*, London, 1909, 41.

enjoyment of which must be granted to every alien. A list of these rights is difficult to draw. They include personal and religious liberty and inviolability of domicile, liberty of the press, and other rights. In particular, the alien has the right to equal protection of the laws, which involves access to the courts and the use of the executive arm of the government in the enforcement of the rights granted.

MAXIMUM POWER OF STATE OVER ALIENS

§ 24a. Matters of Public Law.

Just as there is a minimum limit of rights and concessions which the state must grant to aliens, so there is a maximum limit of control by the state which it cannot exceed without violating the rights of other states. The obligations due by the alien to his national state and the rights incident to the bond of nationality constitute the *raison d'être* of this superior limit of the action of the state with respect to aliens. In greater part it operates as a check upon the state of residence in the grant of political rights and the exaction of political duties. Thus, the alien as a general rule cannot become a voter and is ineligible to public office. Similarly, he is unable to practice those professions or occupations which involve the taking of an oath of allegiance; so in many countries, he cannot become a judge, an attorney at law, a jurymen, or witness to certain transactions. The bond of nationality in other respects inhibits the freedom of action of the state over the alien. Thus, it cannot confer citizenship upon him against his will, or without his manifesting an intention to change nationality. States have by agreement and concession fixed among themselves the conditions under which they will recognize the denationalization of a citizen and his naturalization in another state. The attempts of Venezuela in 1855 and Brazil in 1889 to force citizenship on resident aliens met with vigorous protest.¹ So the state likewise cannot require military service from the alien, nor subject him to the extraordinary taxes and military burdens which citizens must bear. These exemptions are usually provided for by treaty and will be more fully discussed presently.

¹ 17 Clunet (1890), 766; Thomas in 4 R. G. D. I. P. (1897), 641. See, however, W. W. Willoughby in 1 A. J. I. L. (1907), 924. See also *infra*, § 232.

§ 25. Matters of Private Law.

In private law, the maximum limit of action has been fixed by the obligation to respect the "personal statute" of the alien. As affecting alienage, this limitation is more important in Europe, where nationality usually controls capacity and status, than in the United States and Great Britain, where domicile is the criterion of the personal statute. A state frequently declines to give effect to acts done by the alien to escape the penalties of his national law. So in some states a marriage or divorce in fraud of the alien's national law is not recognized. In general, it may be said that the clause of equality between national and alien, incorporated either in treaty or statute, operates simply as a limitation upon the arbitrary power of the local legislature and relieves the alien from the inferior position in which the municipal law might have placed him. It does not relieve him from those exceptions to equal treatment which the public interest in many countries is believed to dictate, *e. g.*, limitations upon his right to own real property, or to own shares in national vessels. Likewise, the effect and force of many acts of the alien may be different from those of the national. He may be required to register his alienage, to comply with various matters of form, as, *e. g.*, in case of marriage, and in other respects accept rules different from those applying to nationals. So long as his position is not one of inferiority, the clause of equality is not considered as having been violated.

Before it is possible to establish the obligations of a state toward aliens, which must be done before the responsibility of the state can be determined, it is necessary to examine in somewhat greater detail the relations between the state and the alien, the rights and obligations of the state, and the rights, duties and disabilities of the alien.

ADMISSION AND EXCLUSION

§ 26. State's Right of Exclusion.

The first point of contact between a state and an alien is at the frontier or port where he presents himself for admission. The first inquiry, therefore, before examining the rights of the alien within the country, will be directed toward the right of the state to exclude and expel the alien. The vast extent of immigration within the last

half century and the growth of commercial intercourse, accompanied by a general recognition of the right of emigration and expatriation, have lent considerable importance to this inquiry.¹

Publicists have disagreed as to the governing principles and governments as to the expedient policy. Those writers who base their conclusions upon the assumption that there is a fundamental right of international intercourse between states, maintain that no state can absolutely forbid entrance to aliens, although it may exclude those whose presence is a menace to the welfare of the state.² On the other hand, taking the sovereignty of the state and its right of self-preservation as the point of departure, other publicists, by far the more numerous, agree that there is an inherent right of the state to exclude aliens at its pleasure.³ As Hall justly remarks, however:

"The exercise of the right is necessarily tempered by the facts of modern civilization. For a state to exclude all aliens would be to withdraw from the brotherhood of civilized peoples; to exclude any without reasonable or at least plausible cause is regarded as so vexatious and oppressive, that a government is thought to have the right of interfering in favour of its subjects in cases where sufficient cause does not in its judgment exist."⁴

Courts in the United States and Great Britain which have had to pass upon the question, on writs of habeas corpus or in actions against administrative officers for preventing a landing or for the enforcement of an order of deportation, have affirmed the right of the state

¹ See the Resolutions on emigration of the Institute of International Law, *Annuaire*, XVI, 242 *et seq.*

² Bluntschli, *Dr. int. codifié*, § 381; Pözl and Mohl, cited by Stoerk in Holtzendorff's *Handbuch*, II, 637; Liszt, *Völkerrecht*, 9th ed., 1912, § 25, p. 187.

The Institute of International Law adopted the following resolution: "The free entrance of aliens on the territory can only be prohibited in a general and permanent manner for reasons of public interest and extremely grave motives, *e. g.*, by reason of a fundamental difference of morals or civilization, or by reason of an organization or dangerous accumulation of aliens who appear *en masse*. *Annuaire*, XII, 192, 220.

³ See Oppenheim, I, 390 and bibliography there cited. See also von Overbeck, A., *Niederlassungsfreiheit u. Ausweisungsrecht*, Karlsruhe, 1907; Jeancourt-Galignani, A., *L'immigration en droit international*, Paris, 1908; Bouvé, C. L., *Exclusion and expulsion of aliens in the United States*, Washington, 1912; Regulations and resolutions of the Institute of International Law, *Annuaire*, XI, 277, 41, 273; XVI, 262 and 276. See also § VI, Control of immigration, in Moore's *Dig.* IV, 142 *et seq.*

⁴ Hall, 6th ed., 211.

to exclude those whom it will.¹ The Supreme Court of the United States has stated what is believed to be a general principle:

‘It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.’²

Diplomatic papers have uniformly upheld the sovereign right of exclusion.³ In England, it has been held that an alien has no legal right enforceable by action to enter British territory.⁴

International intercourse, however, is so essential to the existence of the society of states that in practice the right of admission is freely accorded, subject to specific exceptions fully announced in advance and recognized as reasonable by international public opinion. The network of commercial treaties by which the states, of the white race at least, are bound together, has practically established the rule of freedom of international intercourse. A government that would seek to-day to take advantage of its right to exclude all aliens would violate the spirit of international law and endanger its membership in the international community.

Yet it is upon this ultimate power that is based the right of the state to exclude undesirable aliens and fix the conditions of admission. The power of exclusion is admitted in the passport system⁵ which was at one time universal and still exists to a limited extent. The grounds of exclusion are fixed by the public interests of each state, and governments claim the right to determine for themselves what aliens or classes of aliens are dangerous or undesirable. For political, social

¹ *Musgrove v. Chun Teeong Toy*, L. R. 1891, App. Cas. 272; *The Chinese Exclusion Case*, *Chae Chan Ping v. United States*, 130 U. S. 581, 606; *Nishimura Ekiu v. United States*, 142 U. S. 651, 659; *U. S. v. Greenawalt*, 213 Fed. 901. See also address of Mr. Mastier before the International Law Association, 19th Report, p. 48.

² *Nishimura Ekiu v. United States*, 142 U. S. 659. See also papers of Charles Earl and C. L. Bouvé before the 1911 meeting of the American Society of International Law, Proceedings, 66, 95.

³ See extracts quoted in Wharton's Dig., § 206. Agreement between U. S. and Venezuela for settlement of Jaurett claim, For. Rel. 1909, 629.

⁴ *Musgrove v. Chun Teeong Toy*, L. R. 1891, App. Cas. 272, 282.

⁵ *Westlake*, I, 216.

and economic reasons various classes of aliens are excluded.¹ They may usually be brought within one or more of the following classes, which comprise those persons who by existing law are excluded from the United States: (1) aliens who are physically or morally defective; (2) aliens contagiously diseased; (3) alien paupers or beggars and aliens generally who are incapable of maintaining themselves, or are likely to become a public charge; (4) aliens deemed morally, socially, or politically unfit, as prostitutes, procurers, criminals, anarchists and polygamists; (5) contract laborers, or aliens induced or solicited to migrate by offer or promise of employment; (6) assisted aliens, or those whose passage is provided by any corporation, society, or foreign government; (7) alien races considered inferior or not capable of assimilation, *e. g.* Chinese and certain Japanese laborers in the United States and many of the British colonies, the gypsies in many European countries, and Turks in Panama.²

The stipulations of commercial treaties, providing for general freedom of intercourse, do not prevent the exclusion of these undesirable classes. International claims because of exclusion are rare. Nevertheless, the United States has on numerous occasions protested against discriminations against certain classes of American citizens excluded because of race, profession or creed, especially where, by treaty, rights of residence and travel were assured to all citizens of the United States. The most prominent of this type of cases was the long continued protest against the exclusion by Russia of American citizens of Jewish faith, which ultimately culminated in the abrogation by the United States of the treaty of 1832 with Russia.³ While

¹ Frisch, *op. cit.*, 91 *et seq.* The Institute of International Law has declared that the protection of national labor is not alone a sufficient reason for exclusion. (Annuaire, XII, 220.)

² Charles Earl in Proceedings of the American Society of Int. Law, 1911, 67-68. See also Moore's Dig. IV, 142 *et seq.*, and 31 Clunet (1904), 977. By a law of August 13, 1903 Haiti excluded all Syrians from that country and fixed a time for those then in the country to leave. For. Rel. 1904, p. 394. But the statute is not enforced against Syrians who became naturalized Americans prior to the law of 1903, and were resident in Haiti before 1903. For the Panama regulations see 11 R. G. D. I. P. (1904), 565-567.

³ Cases of such special discrimination, with extracts from the diplomatic correspondence will be found in Moore's Dig. IV, 109 *et seq.* But the U. S. did not deny

the enforcement of an order of exclusion against all the subjects of one state might be considered an unfriendly act and warrant reprisals and perhaps war, states have generally, in the absence of treaty, refrained from contesting the practice of excluding their individual subjects considered undesirable by other states. An arbitrary or unjust exclusion would give rise rather to a political than to a legal pecuniary claim, unless in violation of local law.

Closely connected with the right of exclusion or admission on conditions is the right of asylum on what is in fact national territory. This is the right of a state by virtue of its territorial supremacy to admit to its territory fugitive aliens from other states and to accord them such hospitality as in its discretion it desires to extend. It is not, as is often erroneously assumed, a right of the individual to claim admission, but by international practice it has been conceded to be a right of the state. It is granted usually to political offenders, whose surrender is generally excepted from the stipulations of extradition treaties. The duty which every state by comity owes to other states warrants it in using repressive measures to prevent the received alien from becoming a source of danger to the safety of another state.¹

EXPULSION

§ 27. State's Power to Expel.

The power to expel aliens rests upon the same foundation and is justified by the same reasons as the power to exclude, namely: the sovereignty of the state, its right of self-preservation, and its public interests. The Supreme Court has said:

the right of Haiti to exclude all Syrians, even naturalized Americans (except those above mentioned), in view of the fact that the U. S. excluded Chinese, regardless of their acquired nationality. (Act of July 5, 1884, ch. 220, § 15; 20 Op. Atty. Gen. 729.) While admitting Haiti's right, the U. S. insisted that there be no discrimination between Americans and other nationals of Syrian origin. Great Britain insisted that those already established in business be not disturbed.

¹ Oppenheim, *op. cit.*, 392; Hall, 6th ed., 211. From the state's right of asylum is derived the practice of legations and consulates in granting asylum to political refugees. An abuse of the right has occasionally resulted in its extension to other classes of offenders, which has given rise to diplomatic remonstrance. See article by Barry Gilbert, *The practice of asylum in legations and consulates of the United States*, 3 A. J. I. L. (1909), 562-595. The practice is discouraged by the United States.

"The right to exclude or expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare." ¹

Nor is the right of expulsion limited by treaties which guarantee to the citizens of the contracting parties the right of residence and travel, or of trade, and other rights. Pradier-Fodéré expresses the principle as follows:

"Treaties and declarations by which a government stipulates for its citizens a right of sojourn, of acquiring real property, of carrying on an industry on foreign territory, ought not to be interpreted as involving a renunciation on the part of the other contracting power of its right to expel aliens whose conduct should make it desirable." ²

As will be seen, however, this right is not unqualified. It cannot be exercised indiscriminately or arbitrarily, but is limited and restricted by the obligations imposed upon the state by international law.³

In former times expulsion, collective and individual, was freely exercised. In recent times collective expulsion has been resorted to in case of war only and even then it has become an exceptional measure. Individual expulsion, while still practiced, and claimed by states to be an inherent right of sovereignty, has likewise been limited, by statute and treaty, both as to the justifying causes and the manner of exercise. While the grounds of exclusion are usually prescribed by statute, governments rarely attempt to enumerate the grounds of expulsion. Great Britain (Aliens Act of 1905, 5 Edw. 7, c. 13),⁴

¹ *Fong Yue Ting v. U. S.*, 149 U. S. 698, 711.

² Pradier-Fodéré, P., *Traité de droit int. pub.*, Paris, 1887, III, § 1857. The right of expulsion is sometimes expressly reserved in treaties. Treaty between U. S. and Spain, July 3, 1902, art. 2, Malloy, II, 1702.

³ Von Bar in 13 *Clunet* (1886), 5; Bluntschli, *Droit int. codifié*, §§ 383-384; Rolin-Jacquemyns in 20 *R. D. I.* (1888), 498.

⁴ At common law the Crown has full power to expel a foreigner. The right has been greatly curtailed by statute, and is practically vested entirely in Parliament. The act of 1905 gives the Secretary of State the right to expel aliens who have been (1) convicted in the United Kingdom of serious offenses; (2) who have been certified within twelve months after their arrival to have been in receipt of parochial relief or found wandering without ostensible means of subsistence, or been living under insanitary conditions due to overcrowding; or (3) who have arrived in the United Kingdom since the passing of the Act, and been sentenced in a foreign country for

the United States (Act of February 20, 1907),¹ and Brazil (Law of January 7, 1907)² have undertaken by statute to set forth the grounds of expulsion. The terms of the statutes are quite broad. An enumeration of specific grounds is, however, an exception to the rule, as states have not generally been willing thus to hamper their freedom of action. Nevertheless, the growth of international intercourse has tended to limit the exercise of the right of expulsion, and by municipal law and treaty many states have now limited their freedom of action by exempting from the persons liable to expulsion certain classes of aliens, by permitting judicial recourse against administrative orders, or by agreeing to notify the individual or his legation and to state the grounds of expulsion.

It may be useful to examine the statutes of a few states to notice the tendencies of modern legislation. France, by a law of December 3, 1849, regards expulsion as a police measure to which all aliens are subject. This appears to be also the rule in Germany, Italy, Roumania and other countries.³ In Belgium, Brazil and other states certain categories of aliens are exempt, particularly those who by residence or marriage have identified their interests with the state. Thus, in Belgium, an alien who has established his domicile, and, in Brazil, who has resided in the country for two years;⁴ or, in Belgium, the Netherlands and Brazil, a foreigner who has married a native

an extraditable crime not of a political character. See § 3 of the Act, and Henriques, H. S. Q., *Aliens and naturalization*, London, 1906, p. 13.

¹ Bouvé, *op. cit.*, 149 *et seq.*

² 4 R. D. I. privé (1908), 855; For. Rel. 1907, I, 113-117; 34 Clunet (1907), 1217. See also Martini, A., *L'expulsion des étrangers*, Paris, 1909, p. 83.

³ Martini, *op. cit.*, 42 *et seq.*; Pradier-Fodéré, *op. cit.*, III, § 1858.

⁴ In some other countries, a definite period of residence acts as a bar to the right of expulsion, even where the person has entered in violation of the exclusion laws or after arrival came within their categories of undesirability. Thus, the Mexican law of Dec. 22, 1908 fixes a period of three years, and the United States act of Feb. 20, 1907 permits deportation of various classes of undesirables within one and sometimes within three years, except that alien prostitutes may by the amendment of March 26, 1910 (see 182 Fed. Rep. 894, 185 Fed. Rep. 967, and 209 Fed. Rep. 496) be deported at any time.

A collection of the statutes of various countries relating to expulsion will be found in the Appendix of the works of Martini and Bouvé, cited above, and in Fiore's *Droit international pénal* (Antoine's edition), chap. III.

woman and who (in Belgium and the Netherlands) has had one or more children during his residence or (in Brazil) is a widower with a native born child cannot be expelled.¹ In Venezuela² and other Latin-American countries expulsion is often limited by the law to transient aliens. Again, Belgium and Luxemburg do not expel minors born there of foreign parents who may claim native citizenship one year after majority.³ The rule is becoming general that domiciled aliens shall not be expelled even as a penalty for crime.

§ 28. Grounds of Expulsion.

The legitimate causes of expulsion it is impracticable to enumerate. A general justification for the action may be summed up in the words "the public interests of the state." As the order affects the citizens of another state, it has in practice become the rule that the government exercising the right of expulsion must on demand furnish evidence that the action was based on a legitimate fear that the public interests were in danger; for while in theory an absolute right and discretion are vested in the government, an arbitrary expulsion constitutes a basis for an international claim. The grounds of expulsion are often identical with those justifying exclusion, namely, undesirability of a moral, social or economic kind. In most statutes governing immigration, the right of expulsion or deportation is a sanction for the provisions relating to exclusion, and numerous expulsions are founded on the charge of presence in the territory in violation of its laws or the

¹ Belgium, law of Feb. 12, 1897. See Halot, A., *Traité de la situation légale des étrangers en Belgique*, Bruxelles, 1900. Belgian decisions cited in 7 R. D. I. privé (1911), 411-417.

Netherlands. Jitta, J., *Le droit d'expulsion des étrangers dans la législation des Pays-Bas*, 29 *Clunet* (1902), 66-70.

Brazil. Instructions of May 23, 1907 in execution of the law of Jan. 7, 1907; 37 *Clunet* (1910), 1377-1380. See also 4 *Ztschr. f. Völkerrecht*, 62-64. For decisions see 5 R. D. I. privé (1909), 632; 6 *ibid.* (1910), 637, and 3 A. J. I. L. (1909), 500. See also Martini, *op. cit.*, 47.

² Law of April 16, 1903, art. 6, quoted in Martini, *op. cit.*, 48; see also *Jaurett (U. S.) v. Venezuela*, Sen. Doc. 413, 60th Cong., 1st sess., 20 *et seq.* *Jaurett* had by five years' residence established his domicile in Venezuela; \$3,000 indemnity was paid by Venezuela. *For. Rel.* 1909, 629.

³ Art. 9 of the civil code of Belgium and Luxemburg. See Martini, *op. cit.*, 46.

regulations concerning the admission of foreigners. In most countries where the ground of undesirability is economic, a residence for a limited period will bar the use of the power of expulsion. In addition to the economic and social grounds of undesirability, political reasons, especially war, have often been the basis of expulsion orders. Perhaps the most frequent cause of expulsion is conviction for crime. All countries reserve this right, although it is resorted to usually in flagrant cases only, where the presence of the alien may compromise the public safety. Where the public necessity is sufficiently great, especially where the crime is of a political nature, expulsion may take place on executive order without a judicial conviction. Primarily, indeed, expulsion is an act of state which escapes judicial review. In the case of countries where by treaty a right of residence and access to courts is assured to citizens of the United States, the Department of State has claimed that a citizen charged with a non-political crime is entitled to a judicial trial before his expulsion.¹ It has been held that the right to prosecute criminally and the right to deport or expel are inconsistent as concurrent rights; the proceedings must be successive.² In some countries, *e. g.*, in Belgium and Luxemburg, expulsion may be ordered for crimes committed abroad, presumably only when a conviction has been had. In some countries of Latin-America the bringing of an unjust diplomatic claim against the state, unless it be adjusted in a friendly manner, is a ground for expulsion.³ The following cases, a few among many, which have occurred in international practice, indicate a wide range of grounds for expulsion: for spreading socialistic propaganda (Jaurès case);⁴ for promoting and organizing a strike (Ben Tillett's case);⁵ for practicing the art of healing without a

¹ Wiener's claim *v. Haiti*, Mr. Gresham, Sec'y of State, to Mr. Smythe, Nov. 5, 1894. For. Rel., 1895, II, 803. See also Santangelo (U. S.) *v. Mexico*, April 11, 1839, Moore's Arb. 3333 and Lapradelle's Recueil, I, 473.

² *U. S. v. Lavoie*, 182 Fed. Rep. 943. See also the case of Mgr. Montagnini in France, 14 R. G. D. I. P. (1907), 175; J. Challamel in *Journal des Débats*, March 12, 1907, reprinted in 34 *Clunet* (1907), 331-334.

³ *E. g.*, Constitution of Nicaragua, art. 12.

⁴ Jaurès (France) *v. Germany*, 1905, Moore's Dig. IV, 69.

⁵ Ben Tillett (Great Britain) *v. Belgium*, August 20, 1896; Desjardins, Umpire, 26 *Clunet* (1899), 203-210; *Conflit entre l'Angleterre et la Belgique à propos de l'expulsion du sieur Ben Tillett de la Belgique*, Bruxelles, 1900.

license (Edwards' case);¹ for writings or speeches derogatory to the government or the army (case of Father Forbes in France;² Hottmann case in Switzerland;³ Kennan case in Russia);⁴ for anarchy (Kropotchine case in Switzerland);⁵ for preaching polygamy (Mormon missionaries in Germany);⁶ for spying or suspicion thereof (Hofmann and Richtofen cases in Switzerland);⁷ for giving immoral performances (Belgium);⁸ for intrigues against the state (expulsion of Spanish ambassador from England in 1584 and similar cases)⁹ or against third states (General Boulanger and Count Chambord in Belgium);¹⁰ and, among the cases with which the United States has had to deal, the expulsion by European countries, particularly Germany and Austria, of natives of those countries who by naturalization in the United States have evaded military service.

The resolutions of the Institute of International Law at its Geneva meeting in 1892 enumerated those classes of undesirable aliens who might properly be expelled: (1) Aliens who have entered the territory fraudulently in violation of the rules governing admission, although if there is no other reason for expulsion, they should not be expelled after having resided six months in the country; (2) aliens who have established their domicile or residence within the territory in violation of an express prohibition; (3) aliens who, when they entered, were afflicted with a disease dangerous to public health; (4) paupers or vagabonds, or those subject to poor relief; (5) aliens convicted of crimes of a serious nature; (6) aliens convicted abroad of crimes made extraditable either by municipal legislation of the country of sojourn

¹ Edwards (U. S.) v. Belgium, 1900, Moore's Dig. IV, 83.

² 19 Clunet (1892), 405.

³ 21 Clunet (1894), 672; see also *ibid.* 982.

⁴ Moore's Dig. IV, 94.

⁵ 9 Clunet (1882), 220; see also U. S. Act of Feb. 20, 1907 reënacting Act of March 3, 1903 and the case of U. S. *ex rel.* Turner v. Williams, 194 U. S. 279; Moore's Dig. IV, 95; article by N. W. Sibley, International law and the aliens act, Law Mag. and Rev., 1909, p. 432; Martini, *op. cit.*, 69.

⁶ For Rel., 1898, p. 347.

⁷ Hofmann case, 20 Clunet (1893), 671; Richtofen case, 29 Clunet (1902), 973; 10 R. G. D. I. P. (1903), 106.

⁸ Tchernoff, J. Protection des nationaux résidant à l'étranger, Paris, 1899, p. 453.

⁹ Martini, *op. cit.* 71 and cases there cited.

¹⁰ 16 Clunet (1889), 65; *ibid.* 73; Martini, *op. cit.*, 72.

or by treaty; (7) aliens guilty of inciting infractions of public security, although the acts as such may not be punishable according to territorial law and are only consummated abroad; (8) aliens guilty of attacking by the press or otherwise a foreign state or sovereign or its institutions, provided the acts are punishable according to the law of the expelling state, if they had been committed abroad by subjects and directed against that state; (9) aliens who are guilty of attacks or outrages against the state, nation, or sovereign, published in the foreign press; (10) aliens who in time of war or imminence of war compromise by their conduct the security of the state.¹

§ 29. Method of Exercising Right of Expulsion.

In many countries expulsion is carried out by administrative order of the minister of interior or other executive officer, the exercise of the power being discretionary. This is the case in France, Italy, Russia and Switzerland. In Great Britain the secretary of state issues the order, but only on the recommendation of a court; in Brazil it requires the concurrence of the minister of justice; in Belgium and Roumania, the action of a council of ministers is necessary, and this amendment was proposed in the French bill of March 14, 1882, which was not enacted into law. The order is in a few countries subject to judicial review, either by administrative courts or special boards, as in France and the United States, or by the ordinary civil courts, as in Brazil and the Netherlands. The motives or grounds of the expulsion cannot usually be reviewed judicially (*e. g.*, in France, Germany, Luxemburg, Spain, Great Britain and even in Brazil), but only the question of alienage and jurisdiction.² In one case at least (*Morphy v. France*), an indemnity was granted to an illegally expelled person.³

¹ 12 *Annuaire* (1892), 223, art. 28; see also 11 *Annuaire* (1891), 310.

² See the decision of Court of Appeals of Paris, Nov. 9, 1911, *Andreu v. Public Minister*, 8 R. D. I. privé, 1912, p. 382; Martini, *op. cit.*, 167 *et seq.* In the United States, a court will order a rehearing if the methods used by the administrative board have been unfair. See T. R. Powell, Judicial review of administrative action in immigration proceedings, 22 *Harvard Law Rev.* 360-366, Bouvé, *op. cit.*, 149 *et seq.* and *White v. Gregory*, 213 Fed. 768. See also Brazilian decision in 3 A. J. I. L. (1909), 500 note.

³ Conseil d'Etat, March 14, 1884. See decision quoted in Martini, 177 and also 190 *et seq.*

The following features of recent developments in the exercise of the power of expulsion may be noted: It is used as a supplementary penalty against the alien for the more important crimes; or because the alien has become socially or politically obnoxious; it is now rarely used as a preventive measure; certain categories of aliens are exempted from the exercise of the power of expulsion; and resort to judicial review is becoming more frequent.

The Institute of International Law drew up at its 1888 and 1892 sessions a set of rules which in large part confirm existing practice and appear reasonable. In the discussions upon these rules three classes of expulsion were considered: First, where despatch is urgent, as in time of war or serious riots, which may affect individuals or entire classes. The peril being immediate and the necessity for haste pressing, it was recommended that this power be given to one police officer without recourse to judicial or administrative review. Such a provision should be merely temporary. Secondly, extraordinary measures of expulsion, directed against whole classes and not against individuals. Such a measure, used as a last resort to safeguard the state against obnoxious foreign elements, should be carried out only after an ordinance, published in advance. Thirdly, ordinary expulsion of undesirable individuals, among whom a distinction was made between domiciled and transient aliens, only the latter, in the opinion of the Institute, being properly subject to expulsion.

§ 30. International Phases of Expulsion.

It is now desirable to take up the more directly international phases of expulsion. It being presumed that the alien has overcome the obstacles to admission and has secured the right of residence, it is reasonable to assume that stronger reasons should operate to justify an expulsion than an initial refusal of admission.¹

International cases arise less frequently because of a dispute as to the expediency of or necessity for expulsion, states having a wide

¹ Westlake, *op. cit.*, 217. The often quoted statement of Vattel is in point here: "The sovereign cannot grant admission to the state in order to draw aliens into a snare." Vattel, *Droit des gens* (Pradier-Fodéré's edition, 1863), Bk. 2, ch. 8, § 104, v. II, 85. Compare the action of Haiti in expelling resident Syrians, *For. Rel.*, 1904, 333 *et seq.*

discretion in these matters,¹ than because of a harsh, arbitrary, or unnecessarily injurious exercise of the right. Even where the justice of the expulsion is not denied, as in the case of naturalized citizens of the United States who, returning to their native countries make themselves obnoxious by boasting of their successful evasion of the local conscription laws, the United States has endeavored, and often with success, to secure an amelioration of the resulting hardship by obtaining a delay in the execution of the order until business affairs could be adjusted and the loss to the individual reduced as much as possible.² To minimize the harsh and arbitrary use of the power, numerous treaties between states stipulate that the subjects of the contracting parties shall not be expelled except for reasons of weight, that the person expelled shall have an opportunity to clear himself of the charges against him, and that the reasons for the expulsion shall be communicated to his state or legation with the evidence. This last provision occurs especially in the treaties between European states and the countries of Latin America, where expulsion has been frequently resorted to. Even in the absence of treaty it has been held that the alien's national government has a right to know the grounds on which the expulsion is based and to have the assurance that the reasons are valid and sustained by evidence.³

Governments of expelled subjects and international commissions have freely assumed the right to pass upon the justification for an expulsion⁴ and the sufficiency of the evidence in support of the charges

¹ *Casanova (U. S.) v. Spain*, Feb. 12, 1871, Moore's Arb. 3353.

² See report of Andrew D. White to Mr. Hay, Sec'y of State, April 21, 1900, For. Rel., 1900, p. 25 *et seq.* and numerous military service cases between United States and Austria and Germany in the volumes of Foreign Relations.

³ Rolin-Jacquemyns in 20 R. D. I. (1888), 498; Woolsey, International law, § 63, p. 85; Heffter, *op. cit.*, § 62; Spitzer's case *v. Austria*, For. Rel., 1892, p. 15; Boffolo (Italy) *v. Venezuela*, Feb 13, 1903, Ralston, 700; Foster *et al.* (U. S.) *v. Mexico*, July 4, 1868, Moore's Arb. 3349; Paquet (Belgium) *v. Venezuela*, March 7, 1903, Ralston, 269, in which it was held that a refusal to make explanation, on request, to the Government of the individual expelled makes such expulsion an arbitrary act.

⁴ Secretary of State Gresham in case of Wiener *v. Haiti*, For. Rel., 1895, II, 800 *et seq.*; Sec'y of State Sherman in Loewi *v. Haiti*, 1898, Moore's Dig. IV, 91; Sec'y of State Olney, Jan. 30, 1896, in Hollander *v. Guatemala*, For. Rel., 1895, II, 775. This is one of the ablest documents on the subject. Zerman (U. S.) *v. Mexico*, July 4, 1868, Thornton, Umpire, Moore's Arb. 3348; Boffolo (Italy) *v. Venezuela*, Feb. 13,

on which an order of expulsion is based,¹ it being admitted in practice, if not in theory, that such an extreme measure as expulsion can be used only when it is shown that the individual's presence is detrimental to the welfare of the state.²

§ 31. Grounds of International Claims.

Arbitrary expulsions either without any or on insufficient cause, or in violation of the provisions of municipal law or of a treaty, or under harsh or violent circumstances unnecessarily injurious to the person affected have given rise to diplomatic claims and to awards by arbitral commissions.

An expulsion without cause or based on insufficient evidence has been held to afford a good title to indemnity. Thus, an expulsion under circumstances of contumely founded on an unwarranted suspicion was considered by Umpire Ralston of the Italian-Venezuelan Commission of 1903 as an illegal exercise of the right of expulsion.³

In several cases against Venezuela one of the principal allegations in the successful contention of the claimant government was that the expulsion of a domiciled alien (by Venezuelan law, an alien residing there for two years or more) was in violation of her municipal law.⁴

1903, Ralston, 705; *Atocha (U. S.) v. Mexico*, Mar. 3, 1849, opin. 589, referred to in Moore's Arb. 1264, but not reported. See also 8 Ct. Cl. 427 and 17 Wall. 329, and von Bar in 13 Clunet (1886), 5 *et seq.*

¹ France claimed the right in certain cases in Haiti, For. Rel., 1894, p. 344. Great Britain, on the expulsion of certain British subjects from Nicaragua in 1895, judged that "no adequate or reliable evidence has been produced to justify the arbitrary and violent action taken against the Queen's subjects." The United States in Wiener's and Hollander's case, *supra*; Boffolo (Italy) *v. Venezuela*, Feb. 13, 1903, Ralston, 705; Maal (Netherlands) *v. Venezuela*, Feb. 28, 1903, Ralston, 914.

² Sec'y Olney in the case of Hollander *v. Guatemala*, For. Rel., 1895, II, 775; Maal (Netherlands) *v. Venezuela*, Feb. 28, 1903, Ralston, 914.

³ Oliva (Italy) *v. Venezuela*, Feb. 13, 1903, Ralston, 780; for an expulsion without cause see Zerman (U. S.) *v. Mexico*, July 4, 1868, Moore's Arb. 3348. For expulsion on insufficient evidence, see cases cited in footnote 1, *supra*. See also the correspondence in the Wiener case, For. Rel., 1895, II, 800 *et seq.* See also protocol in Bezault (France) *v. Guatemala*, Apr. 25, 1904, 102 St. Pap. 604; Descamps and Renault, *Recueil des traités du xx^e siècle*, 1904, 124. (This case does not appear to have come to trial.)

⁴ Boffolo (Italy) *v. Venezuela*, Feb. 13, 1903, Ralston, 705; Paquet (Belgium) *v. Venezuela*, March 7, 1903, Ralston, 265; Jaurett (U. S.) *v. Venezuela*, Sen. Doc. 413, 60th Cong., 1st sess., p. 20 *et seq.*, which was settled by diplomatic agreement.

The violation by a government of its own municipal law to the prejudice of an alien is always considered a valid ground for a claim.

The alleged infringement of treaty rights has given rise to various diplomatic claims for expulsion. Thus, numerous awards were made by the domestic commission of March 3, 1849 dealing with claims against Mexico, on proof that the claimants were expelled from Mexico during the period of the Mexican war in violation of the stipulation of art. 26 of the treaty of April 5, 1831, that in case of war "there shall be allowed the term of six months to the merchants residing on the coast, and one year to those residing in the interior . . . to arrange their business, dispose of their effects," etc.¹ Where they had done nothing to forfeit their immunity from expulsion, their compulsory removal before the expiration of the six months or the year, respectively, was plainly a violation of the treaty. A stipulation in a treaty to the effect that citizens of the United States shall have the right to reside and do business, or are under the protection of the laws, has reënforced the arguments of secretaries of State in protesting against the arbitrary and summary expulsion of American citizens without notification of the charges and an opportunity to refute them and without form of hearing or trial. Thus Secretary of State Gresham, in protesting against the summary expulsion of Wiener by Haiti, laid down the following rule:

"That universal sense of right and justice which suggests that no man should be condemned without a hearing would seem to require that the person singled out for expulsion should, as a general rule, first be notified of the charges against him and given an opportunity to refute them. If the case is so urgent and the presence of the foreigner so dangerous to the State that this can not with safety be done, the expelling Government is under obligation to the Government of the person expelled to explain the grounds of its action, by not only asserting, but proving, the existence of facts sufficient to justify the expulsion."²

¹ Cases reported in Moore's Arb. 3334 *et seq.* In one case (Togno, Moore's Arb. 3345) it was held that a tailor "engaged in cutting and making clothes for customers" was not a "merchant," but could remain uninterruptedly so long as he conducted himself peaceably, under another stipulation in the same article of the treaty; see also Gardiner (U. S.) v. Mexico, Mar. 3, 1849, Opinions 249 (not in Moore).

² Mr. Gresham, Sec'y of State, to Mr. Smythe, min. to Haiti, Nov. 5, 1894, For. Rel., 1895, II, 802. See also Hollander case v. Guatemala and treaty cited by Mr.

So, in his correspondence in connection with the expulsion of American citizens from Nicaragua after the Bluefields troubles in 1894, Mr. Gresham defined the position of the United States as follows:

"Americans are entitled, under the treaty of 1867, to reside and do business in Nicaragua; . . . they can not be deprived of that right unless it has been forfeited, and . . . they are entitled to know the grounds of forfeiture. If forfeiture is claimed for causes other than political, they are entitled to an open and fair trial. If for alleged participation in an insurrectionary movement against Nicaragua, they should be informed of the charge against them and the evidence in support of it. This position will be maintained by the United States hereafter in all cases."¹

The naturalization treaty with Austria, by which naturalized citizens of the United States are to be permitted to reside in Austria unmolested, has given support to the contention of the United States that in the absence of a charge of some wrongful act, a native Austrian who had emigrated before his eligibility to military service and, returning as a naturalized American citizen, was peaceably residing in Austria, was not subject to expulsion.² In cases where by boasting or other obnoxious conduct or example the expatriated native obtrusively displays his successful evasion of military service so as to make his presence unwelcome, the United States has not denied the justification of an expulsion, its efforts in such cases being confined to securing an amelioration of the hardship to the victim. The United States has frequently endeavored to overcome the assumption, advanced in certain cases by Germany, that the naturalized citizen intended by his emigration to evade military service, and therefore was properly subject to expulsion.³

The most numerous cases arise because of the unduly oppressive exercise of the power of expulsion. It is fundamental that the measure should be confined to its direct object, getting rid of the undesirable foreigner. All unnecessary harshness, therefore, is considered a justification for a claim. Even where an expulsion is admitted to be Olney in *For. Rel.*, 1895, II, 778. See also *Santangelo (U. S.) v. Mexico*, April 11, 1839, *Moore's Arb.* 3333; *Atocha v. U. S.*, 8 Ct. Cl. 427.

¹ Mr. Gresham, Sec'y of State, to Mr. Baker, min. to Nicaragua, October 30, 1894, *For. Rel.*, 1894, App. I, 351-352, quoted also in *Moore's Dig.* IV, 100.

² Expulsion case of Gustav Wolf Louis Fischer, *For. Rel.*, 1900, pp. 16-28.

³ *For. Rel.*, 1901, p. 158; see also *For. Rel.*, 1902, pp. 457-459.

justifiable, it should be effected with as little injury to the individual and his property interests as is compatible with the safety and interests of the country which expels him. Secretary of State Olney expressed this principle as follows:

"The expulsion of a foreigner is justifiable only when his presence is detrimental to the welfare of the State, and . . . when expulsion is resorted to as an extreme police measure it is to be accomplished with due regard to the convenience and property interests of the person expelled."¹

So, the expulsion by Turkey of Armenians, naturalized citizens of the United States, was confined through diplomatic interposition by the United States to mere removal from Turkish territory, and an excessive incidental imprisonment and other oppression which had been practiced by Turkey as a punishment for their unauthorized naturalization abroad was abandoned.²

The principle that an expulsion must be carried out in a manner least injurious to the person affected has been enunciated on several occasions by international tribunals. Thus, summary expulsions, by which individuals were compelled to abandon their property, subjecting it to pillage and destruction,³ or by which they were forced to sell it at a sacrifice,⁴ or by which they were subjected to unnecessary indignities, harshness or oppression,⁵ have all been considered by international commissions as just grounds for awards.

¹ *Hollander case v. Guatemala*, For. Rel., 1895, II, 776. This instruction of Mr. Olney to Mr. Young, Jan. 30, 1896 contains quotations from Rolin-Jacquemyns, von Bar, Bluntschli and Calvo to the effect that harsh or arbitrary expulsion affords good ground for a diplomatic claim. Hollander was summarily expelled, was not permitted to see his family or make any business arrangements. He was later permitted to return. In the *Scandella case v. Venezuela* in 1898 Scandella was summarily arrested, thrown into prison, denied communication with his family and friends, and placed on a steamer, leaving his family without funds, and his property subject to destruction and theft. (For. Rel., 1898, pp. 1137-1148.) See expulsions from Cuba, Mr. Olney to Mr. de Lôme, Sept. 27, 1895, II, 1229-1231; Expulsion of Loewi from Haiti, 1896, For. Rel., 1896, pp. 382-386.

² See For. Rel., 1893, p. 683 *et seq.*

³ *Gardiner (U. S.) v. Mexico*, Mar. 3, 1849, opin. 269 (not in Moore).

⁴ *Jobson (U. S.) v. Mexico*, Mar. 3, 1849, opin. 553 (not in Moore); *Gowen and Copeland (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3354-3359.

⁵ *Maal (Netherlands) v. Venezuela*, Feb. 28, 1903, Ralston, 915; *Boffolo (Italy) v.*

An expulsion founded upon a special discrimination against an alien, on account of his nationality, race or creed may be and has often been considered an unfriendly act to his national government, and has given rise to diplomatic claims.¹

§ 32. In Time of War.

The outbreak of war makes alien enemies of the respective subjects of the belligerents. International law authorizes the state to expel from its territory all or any of the subjects of its enemy.² No other reason than the existence of the war need be given.³ Municipal statutes in Great Britain and the United States have confirmed this right of expulsion in time of war, and give the President or Parliament the power to declare the conditions under which it shall be exercised.⁴ While formerly such expulsions *en masse* were common, they have been but rarely resorted to in recent times. Thus, in the Crimean War in 1854, Russia permitted French and British subjects to continue peaceably to reside; Italy similarly extended this privilege to Austrian subjects in the Italian War of Liberation of 1859 and to Turkish subjects in the Turko-Italian war of 1912; China and Japan extended it respectively in the Chino-Japanese War of 1894, as did the United States and Spain respectively in the Spanish-American War of 1898, and Japan again in the Russo-Japanese War of 1904. In the present European War, alien enemies have in general been permitted to remain, under various measures of surveillance.

On the other hand, France considered it necessary to expel German subjects during the Franco-Prussian War of 1870, Turkey, to expel

Netherlands, Feb. 13, 1903, Ralston, 702. See also Jaurett (U. S.) *v.* Venezuela, Sen. Doc. 413, 60th Cong. 1st sess., 20 *et seq.*, 559 *et seq.* (settled by agreement of Feb. 13, 1909, For. Rel., 1909, 629).

¹ See Mr. Uhl, Act'g Sec'y of State, to Mr. Terrell, Dec. 7, 1893, For. Rel., 1893, p. 707. See also the diplomatic correspondence quoted in Moore's Dig. IV, 109.

² Hall, *op. cit.*, 6th ed., 383-388. The right of expulsion *en masse* is supported by Diena (Principi, 468), Nys (III, 105) and Catellani (Condizioni e effetti giuridica dello stato di guerra. Venice, 1906, p. 61). Fiore considers the measure as opposed to modern principles of international law. Dir. int. cod. (4th ed.), § 1142.

³ De Rijn (Mexico) *v.* U. S., July 4, 1868, Moore's Arb. 3348.

⁴ See Revised Statutes of the United States, §§ 4067-4070. See also Moore's Dig. IV, 138; Brown *v.* U. S., 8 Cranch, 110, 127.

Greek subjects in the War of 1897 and Italian subjects in the war of 1912, the Boers, to expel British subjects from the Transvaal in 1900, and the Russians, to expel the Japanese from certain provinces in 1904.¹ In the present European War, it seems that Russia has ordered the expulsion of all Turks, and Germans and Austrians have been expelled from French Morocco. A limited time is usually granted for the departure of enemy individuals in the territory and of enemy merchant vessels in the ports of a belligerent.² The permission to remain or the order of expulsion, with the accompanying conditions, are usually published in the form of a proclamation.

With the progress of civilization, there is an increasing tendency to confine the effects of an armed conflict within as narrow limits as possible and to mitigate the rigorous maintenance of the principle that subjects of an enemy state may be treated as enemies, in favor of the unarmed civilian alien, whose person and property are respected, with certain variously stated exceptions, as before the war. This rule is now largely confirmed by treaties by which merchants and traders are allowed a limited period to wind up their affairs and depart, and those engaged in innocent occupations are permitted to remain.³

§ 33. Extradition.

Extradition is closely connected with expulsion. Independently of treaty stipulations, there is no duty incumbent upon a state within whose territory the fugitive may be found to deliver him to a state in whose territory the alleged crime has been committed. In the interests of modern civilization, however, states have voluntarily limited their right of asylum by agreeing by treaty to deliver up such individuals as have offended the criminal law of another state. The

¹ See discussion in Martini, *op. cit.*, 87 *et seq.*, and G. Tambaro in 1 Jahrbuch des Völkerrechts, 740-741.

² Higgins, A. Pearce, The Hague peace conferences, 1909, pp. 294-307. In the absence of treaty or proclamation, a belligerent has a technical right to seize enemy ships in his ports on the outbreak of war. See Russell T. Mount's account of recent practice in 15 Columbia L. Rev. (1915), 318-323.

³ See, *e. g.*, the typical provisions of Art. XXI of the treaty between the United States and Italy, Feb. 26, 1871, Malloy, *Treaties, etc.*, 1910, I, 975, quoted *infra*, p. 109.

subject is also largely regulated by municipal extradition laws. The categories of crimes for which extradition will lie are expressly laid down in the treaties.¹

POLITICAL RIGHTS AND DUTIES

§ 34. These not usually ascribed to Aliens.

The rights and disabilities of aliens are usually discussed from the point of view of their political or their civil character. Political rights are such as involve a share in the control and an active participation in the life and operation of the state. As has already been seen, they are usually denied to aliens. In the United States, exceptions have been made, based on residence, and this tendency appears to be growing. Domiciled aliens in a number of the South American states are granted limited political rights, and an extension of this policy would be only a measure of self-defense, inasmuch as the failure to grant domiciled aliens political rights has given foreign countries some ostensible, if not actual, title to diplomatic interposition, for the alien's inability to exercise political rights deprives him of an important remedy against maladministration.

There is some difference of opinion as to what is included among political rights; for example, Liszt² considers the right of association, freedom of the press, and even the right of residence, as political rights. The tendency, however, is to narrow the term to include merely the right to vote and hold office and the rights (or obligations) incident to citizenship, such as military service, jury service, and the competency to fill certain public offices, for example, in some of the European states, to act as judges, notaries public, advocates, and in similar offices.³

In certain countries, particularly some of those on the American continent, aliens are excluded only from the most important public offices. The acceptance by an alien of a public office in these states without the consent of his national state often involves the loss of

¹ Oppenheim, *op. cit.* I, 403 *et seq.*; Bonfils-Fauchille, *Manuel de droit int. pub.*, 6th ed., Paris, 1912, p. 282 *et seq.*

² Liszt, *Völkerrecht*, Berlin, 1912 (9th ed.), 193.

³ Cockburn, *Nationality*, London, 1869, pp. 158, 159, 163.

citizenship or some of its incidental rights, *e. g.*, diplomatic protection.¹

§ 35. Military Service.

The denial of political rights involves an exemption from political duties. Being without the privileges, the alien is correspondingly exempt from the responsibilities attaching to membership in the political community. Thus, a long series of treaties now in force exempts the alien from compulsory military service and from forced loans or military requisitions, and in some cases this exemption extends to service in the national guard or militia.² The treaties of the United States with some countries exempt only consular officers from compulsory military service.

Two treaties, typical of those concluded by the United States may be quoted. The treaty of July 27, 1853, with the Argentine Republic (art. 10) reads as follows:

"The citizens of the United States residing in the Argentine Confederation, and the citizens of the Argentine Confederation residing in the United States, shall be exempted from all compulsory military service whatsoever, whether by sea or by land, and from all forced loans, requisitions or military exactions."³

The treaty with Italy (art. 3) reads:

"They [citizens] shall . . . be exempt from compulsory military service, either on land or sea, in the regular forces, or in the national guard, or in the militia."⁴

Whether, in the absence of treaty, domiciled aliens enjoy such an exemption is somewhat doubtful. The Norwegian military law of 1857 required military service from aliens who had acquired a "fast domicilium." A British subject, having demanded the protection of Great Britain against this law was directed to go to the courts,

¹ *Infra*, § 380.

² Hall, *op. cit.*, 205; Despagnet, *op. cit.*, § 343. Treaties of the U. S. providing for such exemptions are cited by H. T. Kingsbury in *Proc. Amer. Soc. of Int. Law*, 1911, 218-222.

³ Malloy, *Treaties, etc.*, 1910, I, 23. See also arts. 8 and 9 of the treaty of August 1, 1911 between Great Britain and Bolivia, *Treaty series* 1912, No. 223.

⁴ Malloy, *Treaties, etc.*, 1910, I, 970.

for in the absence of treaty Great Britain could ask for exemption only on principles of equity, on the ground that Norwegians were not subject to military service in England.¹ The legality of the action of France in blockading the La Plata in 1838 and of France and England in blockading Buenos Ayres in 1846 because the Argentine Republic had compelled subjects of these countries domiciled over three years in Argentine to do military service, is questionable.² The United States and Great Britain have conceded extensive rights to foreign governments in enlisting their resident citizens or subjects for all purposes of local defense or police duty. Thus Secretary of State Seward said:

"This government is not disposed to draw in question the right of a nation in a case of extreme necessity to enroll in the military forces all persons within its territories, whether citizens or domiciled foreigners." ³

Secretary of State Fish in 1869 assumed the position that

"this Government, though waiving the exercise of the right to require military service from all residents, has never surrendered that right and can not object if other governments insist upon it." ⁴

The law officers of the Crown rendered an opinion in 1894 to the effect that, by the general rule, an exemption from compulsory military service did not exist, but that treaties had largely established it.⁵

These admissions, however, cannot be construed as authorizing compulsory service in the regular army of a nation (*i. e.*, what might be called political service), but only enrollment for police purposes and

¹ Mr. Crowe to Mr. Foreman, Report of the Royal Commissioners on naturalization and allegiance, 1869, Appendix, p. 71.

² Fiore, *Nouveau droit int. pub.*, § 647.

³ Mr. Seward, Sec'y of State, to Mr. White, July 10, 1868, Moore's Dig. IV, 57.

⁴ Mr. Fish, Sec'y of State, to Mr. Redmond, Apr. 3, 1869, Moore's Dig. IV, 57.

⁵ Mr. Bayard to Mr. Gresham, Sec'y of State, July 19, 1894, For. Rel., 1894, p. 253.

The admission by Great Britain, during the Civil War, that those British subjects who had declared their intention of becoming American citizens and had exercised the elective franchise, were properly subject to military duty, if they remained resident, cannot be construed as a consent to the military service of British subjects, but rather as an acknowledgment that by exercising political rights and becoming at least inchoate American citizens, they had subjected themselves to the political obligation of military service.

local protection, especially in times of sudden emergency. Secretary of State Bayard expressed a reasonable view when he declared:

"It is well settled by international law that foreigners temporarily resident in a country cannot be compelled to enter into its permanent military service. It is true that in times of social disturbance or of invasion their services in police or home guards may be exacted, and that they may be required to take up arms to help in the defense of their place of residence against the invasion of savages, pirates, etc., as a means of warding off some great public calamity by which all would suffer indiscriminately. The test in each case, as to whether a foreigner can properly be enrolled against his will, is that of necessity. Unless social order and immunity from attack by uncivilized tribes cannot be secured except through the enrollment of such a force, a nation has no right to call upon foreigners for assistance against their will."¹

So Lord Lyons during the Civil War was instructed by the British government that

"there is no rule or principle of international law which prohibits the government of any country from requiring aliens resident within its territories, to serve in the militia or police of the country, or to contribute to the support of such establishment."²

As a general rule, nevertheless, except in cases of dual nationality or similar possibility of claim, a demand by the home government of an alien compelled to do military service results in his release from service, on grounds of comity, if not of law. In one case at least, the United States was unwilling to submit the question of such compulsory service of an American citizen in Mexico, to the Mexican courts, but demanded an immediate release.³ The French interventions in the Argentine, above mentioned, whether just or unjust, have often been cited as international precedents on the subject. On a

¹ Mr. Bayard, Sec'y of State, to Mr. Bell, min. to the Netherlands, Feb. 3, 1888, For. Rel., 1888, II, 1325, quoted also in Moore's Dig. IV, 62; Mr. Fish, Sec'y of State, to Mr. Williamson, June 13, 1876, Moore's Dig. IV, 59. Mr. Fish sanctioned the compulsory service of a resident alien to defend a town during a siege. Mr. Fish to Mr. Williamson, July 24, 1874, Moore's Dig. IV, 58. Mr. Wilson, Act'g Sec'y of State, to Chargé Hibben, May 19, 1909, For. Rel., 1909, p. 222.

² Quoted in instruction of Mr. Davis, Ass't. Sec'y of State, to Mr. Faxon, Feb. 17, 1870, Moore's Dig. IV, 57. See also Hall, *op. cit.*, 206; Fiore, *op. cit.*, § 649; Bluntschli, *Droit int. codifié*, § 391.

³ Mr. Evarts, Sec'y of State, to Mr. Morgan, Dec. 8, 1880, For. Rel., 1881, p. 751, quoted also in Moore's Dig. IV, 60.

later occasion, Belgium, heeding the protests of certain Powers, relinquished the enforcement of its act of 1907 which imposed service in the civic guard upon aliens.¹

At the second Hague peace conference animated discussions took place as to the right of a belligerent to require military service of neutral residents. While some favored an absolute prohibition, the validity of the municipal legislation of some states, which on occasion requires such service, was recognized. No resolutions on the subject were adopted, but the Conference expressed the "*voeu*" or solemn wish "that the High Contracting Powers shall seek to establish, by agreements between them, uniform contractual provisions determining the relations, in respect of military obligations, of each state with the foreigners established in its territory."²

While many states by municipal law permit the voluntary service of aliens, which in itself raises no international question, some states, for example, France and Germany, expressly exempt foreigners from military service.³ An exceptional and unusual arrangement is the stipulation of the treaty of January 17, 1862 between Spain and France (art. 5) by which each country agrees to incorporate into its army the nationals of the other, resident in its territory, who have not completed their military obligations in their own country.⁴

In the absence of treaty, there appears to be no legal reason why the exemption from military service cannot be commutated or compensated by a tax. Switzerland, by its law of June 28, 1878, imposed such a tax on foreigners established in Switzerland, unless they are exempted by treaties or belong to a state in which Swiss citizens are liable neither to military service nor to a commutation in money. The treaty of November 25, 1850, did not exempt United States citi-

¹ 25 Clunet (1898), 204 and 814; Bonfils, *op. cit.*, § 445, footnote. Numerous treaties confirm this exemption and Despagnet even believes that it exists apart from treaty (*op. cit.*, § 343).

² For a brief account of the discussions see Scott's Hague peace conferences of 1899 and 1907, Baltimore, 1909, pp. 550-555, and v. III of the official report "*La deuxième conférence internationale de la paix*," 179 *et seq.*, and v. I, 125 *et seq.* See also Westlake, *op. cit.* II, 285.

³ Citations in 8 R. D. I. privé (1912), 841.

⁴ 14 Clunet (1887), 326; 12 *ibid.* (1885), 92.

zens from this tax, although almost all the countries of Europe have by treaty secured exemption from it for their subjects. After some diplomatic negotiation, the Swiss Federal Council adopted a resolution that the tax was only to be levied upon Swiss citizens who were residing in or had returned from the United States (Switzerland does not recognize the unpermitted foreign naturalization of her citizens) and not upon citizens of the United States.¹

The treaty with Switzerland, by which citizens of the United States are exempted from personal service only, brings up the distinctions between personal military service and the use of the alien's property for military purposes. Unless treaty provisions expressly exempt the property of the alien from all use for military purposes, there is no valid reason why his property should not furnish the same requisitions and be subject to the same servitudes as that of the native inhabitant. In the countries of Europe, it is usual to require food and fodder from inhabitants under payment of compensation, and to demand from all landowners shelter and quarter for troops and horses during manœuvres, without compensation, as a public servitude. In the absence of a treaty or unjust discrimination against a domiciled alien as such, it does not seem that foreign governments in such cases have on principle any cause for complaint.²

However willing Great Britain and the United States have been, at times, to concede the justice of the claim of foreign countries to require a limited military service of domiciled aliens, they have vigorously insisted on the right of their subjects and citizens to leave the country freely as an alternative to such service. Thus, Secretary of State Madison in 1803, declared:

"The most inviolable and most obvious right of an alien resident is that of withdrawing himself from a limited and transitory allegiance having no other foundation than his voluntary residence itself."³

The claim of the United States during the Civil War to require mili-

¹ For. Rel., 1894, pp. 678-682. See paraphrase in Moore's Dig. IV, 65-66.

² *Les étrangers en France et les requisitions militaires*, 8 R. D. I. privé (1912), 840-845.

³ Mr. Madison, Sec'y of State, to Mr. Pichon, French chargé, May 20, 1803, Moore's Dig. IV, 52.

tary service of resident aliens who had declared their intention of becoming citizens and had exercised the voting privilege was not contested after the option was extended of leaving the country within sixty-five days.¹

Many states by statute prohibit their subjects from taking military service abroad, under pain of loss of their nationality or other penalties. In other states, such service is prohibited only under the neutrality acts, according to which subjects are prohibited to take service in any foreign state against a state with which their own is at peace.²

An important chapter in the diplomatic correspondence of the United States is concerned with the attempts to secure release from the performance of military duty on the part of naturalized American citizens returning to the country of their original allegiance which either still claims the emigrant as its subject or else holds him for evasion of military duty by emigration and naturalization abroad. This matter will receive full consideration hereafter.³

It has already been observed that aliens are deprived of practically all other rights and relieved of duties having a political or public character and involving an oath of allegiance to the state, such as the competency to act as judges, advocates, jurymen, and in similar functions, although Secretary of State Fish once stated that he saw no reason why domiciled foreigners should not be required to discharge such civic duties as service upon juries, or in a municipal fire department, and other duties of like character.⁴

CIVIL RIGHTS

§ 36. Meaning of the Term.

The term "civil rights" is one of most uncertain definition. A

¹ Act of Congress, March 3, 1863. See Halleck, *International law*, 1908 ed., I, 613, footnote.

² See, for example, British Foreign Enlistment Act, 33 & 34 Vict. c. 90; U. S. Rev. Stat., § 5281 *et seq.* See also Halleck, *op. cit.*, 612.

³ *Infra*, § 235 *et seq.*

⁴ Mr. Fish, Sec'y of State, to Mr. Wing, April 6, 1871, Moore's Dig. IV, 58. See also Rolin, *Droit int. privé*, 142. In a recent treaty between Great Britain and Bolivia it is expressly provided that municipal functions may be discharged by the alien without loss of his nationality. Art. 8 of treaty of August 1, 1911, Treaty series 1912, No. 223.

number of continental publicists distinguish between those civil rights which belong to all men regardless of nationality (derived from natural law) or universally acknowledged as the common law of civilized peoples (the *jus gentium* of the Romans), and those which exist only by express provision of the legislature.¹ This distinction is now admitted to be not only theoretical and difficult of application, but fallacious,² and to the Anglo-American mind appears useless. Other writers consider as civil rights those only which have been granted by the legislature, such other rights as are enjoyed by aliens being regarded as natural and not civil rights. Again, the term has been interpreted as meaning private rights or those sanctioned by private law, regulating the legal relations between individual and individual, as distinguished from public rights or those governed by public law, regulating the reciprocal relations between individuals and the state or of states among themselves. In its broadest sense the term includes all rights not political.³ The distinction between civil and political rights being unclear, many authors have adopted a classification of civil rights into public and private, meaning by the former term those non-political rights and liberties which involve a more direct relation between the individual and the state and are protected by public law (such as the right of individual liberty and security, liberty of conscience and of worship, etc.), and by the latter term the rights of individuals among themselves, which are protected by the private law of the state. For purposes of discussion, this is not an inconvenient arrangement.

¹ This distinction is made mainly by the French publicists who rely on the authority of Pothier and Domat. See Pradier-Fodéré, *op. cit.*, § 1636. On the confusion in meaning of the term "civil rights," see Asser-Rivier, *Eléments de dr. int. privé*, 38 and Rolin, *op. cit.*, 139-140. See also Bar, *op. cit.*, 212. We have emphasized the continental position of aliens rather than the Anglo-American, because our interest is principally in the position of Americans abroad, a question of more frequent practical importance in countries of the civil law than in those of the common law. An extended discussion of the principles governing alien legislation in continental countries, with some account of the legislation in each country, will be found in Weiss, *Droit international privé* (2nd ed.), II, 574 *et seq.*

² Laurent, *Droit civil international*, Bruxelles, 1880, II, 17, 21. See also Pradier-Fodéré, *op. cit.*, § 1637.

³ *Annuaire of the Institute of Int. Law*, V, 41-43; 56-57.

§ 37. Types of Legislative Systems.

Legislation concerning aliens and the enjoyment of rights by them may be divided into three categories: first, that which is characterized by no definite principle and retains certain grave incapacities, *e. g.*, the denial of the right to own real estate, which still exists in the legislation of some nineteen states of the United States and in various European countries, and other arbitrary disabilities. In this class belongs the legislation of Great Britain and the United States generally, and of Denmark, Sweden, Roumania and Russia.

The second type of legislation is that based on the principle of reciprocity. This is divided into two classes—diplomatic reciprocity which is the dominating principle of the French law and has been followed by Belgium, Luxemburg (arts. 11 and 13 of these codes) and Greece (arts. 13 and 16), and legislative reciprocity, which is the principle adopted by Germany, Austria and Servia.

Article 11 of the French Civil Code provides that “aliens shall enjoy in France the same civil rights which are or shall be accorded to Frenchmen by the *treaties* of the nation to which that alien belongs.” Hence the name diplomatic reciprocity. The countries adopting this principle expressly recognize two classes of aliens, the ordinary alien, to whom the provisions of the above article apply, and privileged aliens, or those admitted to domicile, who enjoy the same civil rights as nationals. This admission to domicile is a preliminary step to naturalization comparable with our declaration of intention. It is merely a provisional grant of rights which would be subsequently enjoyed by the individual as a citizen, and is valid only so long as actual domicile in the country continues. The question has been raised whether the alien in France can enjoy rights which his national law denies him. Pillet¹ concludes that he cannot, unless (1) the act is completed in and has its effects solely in France; or (2) the act is based on public policy.

The principle of legislative reciprocity accords aliens those rights which their country by legislation grants to foreigners generally or to the subjects of the country in question. Austria formerly adopted two categories of legislative reciprocity, called material or

¹ Pillet, *op. cit.*, 223.

relative if granted by the other country to Austrians, and formal or absolute, if granted to foreigners and nationals alike.¹ Countries adopting the principle of legislative reciprocity usually grant foreigners the same private rights as their subjects, reserving however the power to apply retorsion to the nationals of countries where aliens generally or their subjects alone are handicapped by the particular disability in question. The burden of proof is on the person alleging the disability, and not on the alien, in the first instance, to prove its absence in his national municipal legislation. The United States in the grant of various rights to aliens adopts the test of reciprocity. This test is contained in its copyright laws, in the right of aliens to sue the United States in the Court of Claims, and in other matters.

In modern legislation the principle of reciprocity was first applied by France as a restriction upon the liberal rights which had been granted to foreigners by the legislation of the revolutionary period. Other countries having failed to grant Frenchmen such liberal rights, the civil code conditioned its grant of civil rights to aliens upon the reciprocal concession of such rights to Frenchmen, guaranteed by treaty, in other states. The principle has had a profound influence upon the development of the law of aliens. It is condemned severely by numerous publicists as a survival of the system of reprisals.²

The third system of legislation governing aliens, and the one which has received most modern support, is that of assimilation to nationals, or a grant of equal rights in private law to nationals and aliens. This system was first adopted by the Italian civil code of 1865 (art. 3) and has been followed by Spain, Netherlands, Switzerland, Portugal, Norway, Japan and practically all the countries of Latin America. It has received the approval of the Institute of International Law. It provides that the alien shall enjoy the same civil rights as the national, but it does not exclude the possibility of exceptions, *e. g.*, in the ownership of real property, or of national vessels. So the Institute of International Law added a proviso, "subject to the exceptions formally established by actual legislation."³

¹ Vesque von Püttlingen, *Die gesetzliche Behandlung der Ausländer in Oesterreich*, Vienna, 1842, § 42. Norsa in 6 R. D. I. (1874), 260.

² Bar, *op. cit.*, 214-216 and authorities there cited.

³ *Annuaire*, V, 56.

It will be seen, therefore, that classes one and three tend to approach each other. This may also be said of classes two and three, inasmuch as the extension of rights to aliens by treaty, legislation and judicial construction has greatly restricted the number and extent of the disabilities which the principle of reciprocity imposed upon the alien. As a general rule it may be said that aliens now enjoy all civil rights (rights other than political) which are not expressly denied to them.¹

§ 38. Public Rights.

It would be difficult to draw up a list of the civil rights which the alien enjoys. Indeed, no complete enumeration of legal rights has been attempted and only those have been defined which have been at times violated.² Nevertheless, it is true that both by customary and statutory law numerous rights have been recognized as belonging to the alien, although their remedial enforcement is unnecessary until a threatened or actual invasion occurs. The attempt may therefore be made to review briefly the more general of the civil rights usually granted to the alien, and for the purpose of discussion we may begin with those rights called on the continent of Europe "public rights."

Vague as is the definition of public rights and many as are the characteristics which it has in common with private rights, the term has in general been applied to those rights or faculties which are enjoyed by the individual in relation to society as a whole, and which are under the direct protection of public law. They embrace all the rights and liberties incidental to the rights of life, liberty and property and are discussed by continental writers under such heads as individual liberty, security of person and property, the liberty of circulation and emigration, liberty of conscience and worship, freedom of the press, freedom of association and assembly, the right of petition, liberty to carry on commerce and trade, the procreation of the race, etc. Some writers, like Weiss, consider these "public rights" as the rights of man. This has an unwelcome natural law flavor, and may be disregarded. Inasmuch as their enjoyment by nationals may be restricted and

¹ Laurent, *op. cit.*, III, § 321.

² Robinson, W. C., *Elements of American jurisprudence*, Boston, 1900, §§ 429, 430.

regulated, there is every reason to acknowledge that the public security and interests of the state may dictate, in the case of aliens, still greater restrictions and regulation.¹

The right of individual liberty was not always recognized in the alien, as has been noted. At the present day, of course, he is as free as the national. In the exercise of this liberty, the alien nevertheless remains subject to expulsion and extradition within the limitations already discussed, and to the local penal and police laws.

The liberty of circulation and emigration is intended to give the alien freedom to migrate where he will. The right of admission is subject to the application of the exclusion laws, or the payment of a head tax. The right of sojourn may be subjected to a tax or to such requirements as matriculation in a consulate² or local bureau, the possession of a passport or certificate of citizenship, or, as in France by the decree of October 2, 1888, and the law of August 8, 1893, a declaration establishing the alien's identity, nationality and means of existence.³ This liberty is generally called in the continental treaties the right of establishment, and in treaties of the United States and Great Britain, the right of residence and travel. The right is usually confirmed by treaties reading in effect as follows:

"The citizens and subjects of the two High Contracting Parties . . . shall have reciprocally the right, on conforming to the laws of the country, to enter, travel and reside in all parts of their respective territories . . . and they shall enjoy in this respect, for the protection of their persons and their property, the same treatment and the same rights as the citizens or subjects of the country or the citizens or subjects of the most favored Nation."⁴

¹ Rolin, *op. cit.*, 140, 146. An extensive bibliography of the rights of aliens in practically every civilized country, gathered in the course of several years' research, is printed in the Appendix, *infra*.

² See, however, as to a Peruvian law requiring the registration of U. S. citizens, Mr. Bayard, Sec'y of State, to Mr. Buck, min. to Peru, April 19, 1887, For. Rel., 1887, p. 932.

³ French law relating to sojourn of foreigners, Aug. 8, 1893, translated in For. Rel., 1893, p. 302. See restrictions on the right of sojourn discussed in Tchernoff, *Protection des nationaux*, 428, 432.

⁴ Treaty between the U. S. and Spain of July 3, 1902, art. 1, par. 1, Malloy, *Treaties, etc.*, 1910, II, 1702. On the effect of the "most-favored-nation" clause, especially its employment in treaties of commerce and navigation, see Stanley K. Hornbeck in

This guarantee of protection is rendered effective by the customary consular conventions, which generally contain a provision that the consular officers of the respective parties may have recourse to the authorities of the respective countries within their district, whether federal or local, judicial or executive, in order to defend the rights and interests of their countrymen. They have the ultimate sanction of resort to diplomatic protection.

The liberty of conscience and freedom of worship have obtained more or less general recognition since the peace of Westphalia. These privileges are nevertheless confirmed by treaties reading in effect as follows:

The respective citizens of the High Contracting Parties "shall not be disturbed, molested nor annoyed in any manner, on account of their religious belief, nor in the proper exercise of their peculiar worship, either within their own houses or in their own churches or chapels, which they shall be at liberty to build and maintain, in convenient situations, to be approved of by the local Government, interfering in no way with, but respecting the religion and customs of the country in which they reside. Liberty shall also be granted to the citizens of either of the Contracting Parties to bury those who may die in the territory of the other, in burial places of their own, which, in the same manner, may be freely established and maintained."¹

In the absence of treaty, there is no obligation, other than comity, to permit freedom of worship, and the vigorous attempts of countries having a state religion to prevent worship according to other doctrines and religions can be protested on the ground of comity alone. Violations of local law in this regard by individuals could not be met by diplomatic interposition; so where American bibles were introduced into certain Eastern and Catholic countries contrary to local prohibitions, good offices only were authorized to secure an amelioration in the harsh application of the law. Active propaganda of a foreign religion obnoxious to the country as a disturbance of its established religion has not been supported by the United States. But very few countries at the present day restrict peaceful worship by aliens.²

3 A. J. I. L. 395, 619 and 797 and bibliography, p. 396. See also Moore's Dig. V, 257 *et seq.*

¹ Treaty between the U. S. and Argentine, July 27, 1853, art. 13, Malloy, Treaties, etc., 1910, I, 24.

² Notes quoted in Moore's Dig. II, § 194, pp. 171-181.

Several South-American countries at one time denied to Protestant clergymen the right to perform a marriage ceremony, and in other respects denied religious liberty to non-Catholics. No marriage was recognized unless sanctioned by a Catholic priest. Children of Protestant marriages were considered illegitimate and could not inherit property. On representations of the United States, Peru, and later Ecuador and Bolivia changed their laws so as to recognize Protestant marriages and rights thereunder.¹

The freedom of speech and of the press is usually granted to aliens. The extent of this freedom differs from country to country, being generally more restricted in monarchical countries. Certain statements may incur the penalties of the criminal law, as incitement to murder or other crimes. The alien is never relieved from liability to actions for libel. In some countries, as in France, the freedom of the press may be subjected to special requirements, *e. g.*, that the director of a newspaper be a citizen.²

The right of association and assembly has been sometimes considered a political right. Where used for political purposes, obnoxious to the interests of the state or to the laws of police and safety, there appears little question as to the state's right to deny it to foreigners. So, in 1881 an international congress of socialists was prohibited by the Swiss authorities in Zurich. The federal court considered the right of an associated propaganda a political right which could constitutionally be refused to foreigners.³ The German law of association and assembly is limited to nationals, but its exercise by aliens for non-political purposes has apparently never been hampered. In France, the right is granted to foreigners, subject to the laws of police and safety. Where certain kinds of associations are permitted, as, for example, professional syndicate associations, it is sometimes required that the directors and administrators be nationals, *e. g.*, by the French law of March 2, 1884, article 4.⁴

¹ Mr. Hay, Sec'y of State to Mr. Bridgman, Sept. 1, 1899, For. Rel., 1899, pp. 112-114.

² Law of July 29, 1881, art. 6; Weiss, *Droit int. privé*, II, 115; Rolin, *op. cit.*, 146-147. See also notes quoted in Moore's *Dig.* II, § 193, pp. 161-171.

³ Orelli in 14 R. D. I. (1882), 473 *et seq.*; Baty, *International law*, 1909, p. 188.

⁴ Weiss, *op. cit.* II, 115, 116.

The right of petition is not uniformly granted to aliens. In a number of countries, aliens may exercise this liberty with respect to matters which especially concern aliens, but not in matters relating to politics or similar affairs.¹

The liberty of instruction is usually granted to foreigners, and compulsory public school attendance is imposed upon them.² In the Japanese school question the right of Japanese subjects to receive public instruction in the United States gave rise to acrimonious diplomatic negotiations. The treaty between the United States and Japan provided for a right of residence. That this right involved the right of Japanese children to be admitted on equal terms with other foreigners to the public schools was asserted by Japan, on the occasion of the passing by the San Francisco School Board of a resolution segregating the Japanese children from the whites and placing them in separate schools. After a suit had been instituted by the federal government to force California to comply with the treaty, which prohibited discrimination, the matter was compromised by the withdrawal of the resolution and an amendment of the immigration law with a new agreement or understanding by which Japan undertook to restrict the emigration of Japanese laborers to the United States. It is believed that the treaty was complied with by granting equal rights of instruction, which need not necessarily be given in the same schools with white children.³

The liberty of commerce is usually provided for in treaties.⁴ It includes the incidental rights to come freely with vessels to the ports

¹ Frisch, *op. cit.*, 332; Weiss, *op. cit.*, II, 117.

² Tchernoff, *op. cit.*, 489 *et seq.*; Weiss, *op. cit.*, II, 118 *et seq.*; 18 Clunet (1891), 1056-1058.

³ The real questions under the Japanese treaty, etc., by Elihu Root, 1 A. J. I. L. (1907), 273 *et seq.* The Japanese school incident by Theodore P. Ion in Proceedings of the Amer. Soc. of Int. Law, v. 1 (1907), 173-194; Barthélemy in 14 R. G. D. I. P. 636 *et seq.* A review of various expressions of opinion as found in current periodical literature is given in an editorial comment in 1 A. J. I. L. (1907), 449-452. Treaty of Feb. 21, 1911, Treaty series, 558, Malloy, Treaties, etc., III (supplement), 77, 82.

⁴ Until recently some European countries greatly restricted the commercial rights of aliens. Thus, until 1873, it was necessary in Denmark to be a Danish subject or to have resided there six years in order to be a merchant in that country. Other restrictions existed in Sweden. See Bonfils, *op. cit.*, § 451.

of the country, to hire and occupy houses and warehouses for purposes of residence and trade, to carry on domestic trade, etc.¹ The treaties read somewhat like the following:

"The citizens of the two countries, respectively, shall have liberty, freely and securely, to come with their ships and cargoes to all places, ports and rivers in the territories of either, to which other foreigners, or the ships or cargoes of any other foreign nation or State, are, or may be, permitted to come; to enter into the same, and to remain and reside in any part thereof, respectively; to hire and occupy houses and warehouses, for the purposes of their residence and commerce; to trade in all kinds of product, manufactures and merchandise of lawful commerce; and generally to enjoy, in all their business, the most complete protection and security, subject to the general laws and usages of the two countries respectively."²

There are generally joined to this treaty provision other clauses providing that no discriminating duties shall be levied and that navigation charges shall be equal, to which is usually added the most favored nation clause. In addition, all rights growing out of relations of trade and commerce are guaranteed, with a provision against any discrimination in taxes or imposts. In the treaty between the United States and the Argentine Republic, this special clause reads:

"In whatever relates to the police of the ports, the lading and unlading of ships, the safety of the merchandise, goods and effects, and to the acquiring and disposing of property of every sort and denomination, either by sale, donation, exchange, testament or in any other manner whatsoever, as also to the administration of justice, the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties and rights, as native citizens; and they shall not be charged, in any of those respects, with any higher imposts or duties than those which are paid, or may be paid, by native citizens, submitting, of course, to the local laws and regulations of each country respectively."³

The liberty to carry on trade is sometimes provided in very general terms, as follows:

¹ In the absence of treaty or law, there is no inherent right to carry on domestic trade. See, *e. g.*, exclusion of Syrians in Haiti from right to trade, 1903, *supra*, p. 47.

² Treaty of July 27, 1853 between the United States and Argentine, art. II, Malloy, *Treaties*, etc., 1910, I, 21.

³ Treaty of July 27, 1853 between the United States and Argentine, art. IX, Malloy, *Treaties*, etc., 1910, I, 23.

"The citizens of each of the high contracting parties shall have liberty to travel in the States and Territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established."¹

The right to carry on industry was most strictly limited in the Middle Ages and the centuries following up to the French revolution. The guild rights prevented every free development of industry and trade. At the present time, the freedom of industry is generally granted to aliens on terms of equality with nationals, either in constitutions, statutes or treaties, although from some trades aliens are still excluded or admitted only on condition. The disability of the alien is generally expressed in the statute or treaty. These disabilities are established for economic reasons, either to prevent foreign competition, to reserve national resources for nationals, or to protect national labor.²

Thus, the coasting trade is almost universally reserved to nationals, although some countries, for example, Great Britain (in the United Kingdom), Belgium, Bulgaria, Roumania and most South and Central American states admit aliens to the coastal trade. Admission to this trade is frequently conditioned upon reciprocal concessions. Some countries, like Germany, open the right to foreign vessels by treaty or royal decree.³ Where the liberty is not granted for a special consideration, the most favored nation clause plays a prominent part in extending the liberty to the citizens of other nations.

Fishing in coastal waters is likewise generally reserved to nationals. This appears to be an almost universal practice which has been confirmed by international treaties and conventions, *e. g.*, The North Sea Convention of 1882. Some states, as, for example, most of the states of

¹ Treaty of Feb. 26, 1871 between the United States and Italy, art. II, Malloy, *Treaties, etc.*, 1910, I, 970. On liberty to trade see Baty, *op. cit.*, 41, 57.

² Frisch, *op. cit.*, 316.

³ Decree of Germany of Dec. 29, 1881 opening coasting trade to various nations, 92 State Pap. 817; British Act, 17 Vict. ch. 5 (1854), 44 St. Pap. 923; Portuguese decree of Oct. 21, 1880 opening a limited coasting trade, 73 St. Pap. 304 and Dec. 15, 1885, 77 St. Pap. 130. See also Liszt, *op. cit.*, 190.

the United States, Greece, and Portugal, admit aliens to coastal fishing.¹

Ownership in national vessels is often limited, in whole or up to a certain percentage, to nationals, and employment as officers on national vessels is frequently confined to nationals.

The practice of certain professions is either confined to those having political rights (aliens being thus automatically excluded), *e. g.*, advocates, avoués, judicial officers, notaries, etc., in France, or else subjected to the requirement of a national diploma, *e. g.*, physicians and dentists.² The exercise of certain occupations is sometimes conditioned upon reciprocity, as for example, the practice of pharmacy in France.

The protection of national labor has dictated such legislation as the French law of October 2, 1888, and that of August 8, 1893, which establish special conditions upon the employment of aliens, such as matriculation and other minor requirements, penalty for non-compliance being imposed on the employer.³ The protection of national labor against foreign competition is responsible for numerous classes of exclusion laws, such, for example, as the Chinese exclusion acts. States sometimes provide that aliens shall not be employed on the public works of the state. France has on several occasions so provided,⁴ and various states of the United States possess constitutional provisions or have passed statutes to this effect.⁵ Foreign workmen in

¹ Pradier-Fodéré, *op. cit.*, V, §§ 2448-2451. See also, on the right to participate in the coasting trade and coastal fishing the compilation of the writer on "Coastal waters," Washington, 1910, prepared in connection with the North Atlantic Coast Fisheries Arbitration at the Hague, 1910.

² Droits des médecins étrangers en France by E. H. Perreau, 37 *Clunet* (1910), 21-35; Frisch, *op. cit.*, 331. See also *For. Rel.*, 1896, 140; Moore's *Dig. II*, § 195; Resolutions of Second Pan American Congress, Mexico, 1901, S. Doc. 330, 57th Cong., 1st sess.

³ Weiss, *op. cit.*, II, 141; Frisch, *op. cit.*, 329.

⁴ *E. g.*, Circular of the Minister of Agriculture of Dec. 2, 1887, 14 *Clunet* (1887), 794.

⁵ *E. g.*, Arizona, Idaho, Wyoming, Massachusetts, New Jersey, Pennsylvania, California, Oregon, Montana, Nevada, Hawaii and New York; § 14 of the Labor Law of New York (Consolidated Laws) provides that "in the construction of public works by the State or a municipality, or by persons contracting with the State or such municipality, only citizens of the United States shall be employed. . . ." The New York Court of Appeals recently (Feb. 25, 1915) held this statute constitutional

various European countries are only within certain limitations admitted to the benefits of workmen's insurance.¹ Reciprocity treaties have largely mitigated these discriminations, and the attempts of international labor associations will do much to bring about equality of treatment between disabled workmen regardless of nationality.²

Some countries do not grant poor relief or the benefit of their charitable institutions to aliens,³ so that many European countries have undertaken to assist their nationals abroad who need such relief. Reciprocity treaties largely govern the matter. The laws of the United States, Great Britain and France are among the most liberal in this respect, for aliens are admitted to the various forms of social assistance and poor relief without the requirement of reciprocal privileges.⁴ In the United States the pauper alien, subject to a limited power of deportation after admission, is cared for locally, and the foreign government is not asked to assume the expense of returning him to his own country. On the other hand, the United States will not bring back to this country from abroad an indigent American citizen.⁵

(*People v. Crane*, N. Y. Law Journal, March 4, 1915) reversing the Appellate Division (150 N. Y. Supp. 933). A note on the decision in the lower court may be found in 15 Columbia L. Rev. 263. The case has been brought to the U. S. Supreme Court on appeal.

¹ Die Stellung der Ausländer in der Arbeiterversicherung der europäischen Staaten by F. W. Günther in 6 Ztschr. f. d. gesam. Versicherungswissenschaft (1906), 488-506. Le traitement des étrangers au point de vue de la responsabilité civile et de l'assurance, 2 R. D. I. privé (1906), 94-101; 4 *ibid.* (1908), 24-35.

² La reciprocité en matière de retraites des ouvriers étrangers, by B. Raynaud, 33 Clunet (1906), 115-124; Raynaud, B., Droit international ouvrier, Paris, 1906; Pic, Paul, La protection légale des travailleurs et le droit international ouvrier, Paris, 1909. Several of the states of the U. S., *e. g.*, Kansas, New Hampshire, New Jersey and Washington, discriminate against non-resident alien dependents. See C. C. Hyde and C. H. Watson in 7 Illinois L. Rev. 414.

³ This is the case in several states of the U. S. Freund, Ernst, The police power, public policy and constitutional rights, Chicago, 1904, § 712.

⁴ Quelques mots sur l'assistance publique en droit international, 5 R. D. I. privé (1909), 785-789. Du nouveau rôle de l'assistance internationale et du droit de séjour des étrangers by Tchernoff, Rev. du droit public, 1899, pp. 86-129; Weiss, *op. cit.*, 148 *et seq.* See also *infra*, § 171.

⁵ See quotations from instructions of Secretaries Day and Sherman in Moore's Dig. IV, 18. The withdrawal of American citizens from Mexico in 1913, and the payment of their expenses was based on special circumstances of assumed danger to life.

The English Alien's Act, and the laws of various other countries governing expulsion, permit of the deportation of an alien who within a brief period after his landing has become subject to poor relief. Old age pensions are generally reserved to nationals.

In the matter of judicial procedure and the jurisdiction of courts, the alien's position differs only slightly from that of the national. As a plaintiff his right to sue is still in many countries subjected to the deposit of security for costs, the *cautio judicatum solvi*.¹ Partly by statute,² partly by reciprocity treaties, and partly by the Hague conventions of 1896 and 1905, the requirement of security for costs has been abolished by most of the countries of Europe.³ In the United States, Great Britain, and the cantons of Switzerland, the security is not required from aliens as such, but from non-residents, whether native or foreign.

The right to sue *in forma pauperis* is granted to aliens in many countries and in most of the states of the United States.⁴ In some countries the grant of this privilege is conditioned upon reciprocity.⁵ The European countries have concluded numerous treaties among themselves for the extension of judicial assistance to their respective citizens or subjects. The United States government declined in 1883 to impose this duty on the states by treaty.⁶

The right of the foreigner to the jurisdiction of the courts for the protection of his rights is now freely granted by treaty, if not recognized as a part of the national law. Thus the treaty between the

¹ The *cautio judicatum solvi* in Roman law covered security for the judgment as well. *Sicherheitsleistung für Kosten* by Dr. Goldschmidt in 23rd Report of the International law association (1906), 182 *et seq.*

² *E. g.*, in Italy, Portugal, Egypt, Denmark, Norway.

³ Maudy, G. A., *La cautio judicatum solvi*. *Les étrangers devant la justice en droit int. privé*, Paris, 1897. *De la caution judicatum solvi* by R. de la Grasserie, 25 *Clunet* (1898), 842-847. *Clunet*, *Tables générales*, I, Nos. 5844-5871; 8939-8941 and bibliography in Appendix.

⁴ Details are not possible here. References by country are given in the bibliography in Appendix. See article by Dr. Victor Schneider on *Foreign pauper litigants* in 23rd report of the International law association (1906), 164 *et seq.*

⁵ Despagnet, *Dr. int. privé* (4th ed.), 148.

⁶ Mr. Frelinghuysen, Sec'y of State, to Marquis Dalla Valle, Mar. 9, 1883, Moore's Dig. IV, 8.

United States and the Argentine Republic (July 27, 1853, art. 8), provides:

"The citizens of the two contracting parties shall reciprocally receive and enjoy full and perfect protection for their persons and property, and shall have free and open access to the courts of justice in the said countries respectively, for the prosecution and defense of their just rights, and they shall be at liberty to employ in all cases such advocates, attorneys or agents as they may think proper; and they shall enjoy, in this respect, the same rights and privileges therein as native citizens."¹

The treaty with Italy, which is typical of the more recent treaties, provides:

"The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives. They shall, therefore, be free to employ, in defense of their rights, such advocates . . . as they may judge proper . . . and such citizens . . . shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise at the taking of all examinations and evidences which may be exhibited in . . . trials."²

The proper court in which to sue an alien varies often with the form and origin of the action, *e. g.*, whether it is a real action, or a cause of action arising within or outside the country, and depends sometimes upon jurisdiction by consent, the possession of local property, and other matters. This question is closely related to the conflict of laws and can hardly be discussed here.³ The right of a foreign corporation to sue in the absence of treaty or of local registration and recognition is disputed, though the modern tendency is to remove all restrictions on this right. A recent treaty of the United States provides:

"Limited-liability and other companies and associations, commercial, industrial and financial, already or hereafter to be organized in accordance with the laws of either High Contracting Party and domiciled in the territories of such Party, are authorized, in the territories of the other,

¹ Malloy, *Treaties, etc.*, 1910, I, 22.

² Treaty of Feb. 26, 1871, art. 23, Malloy, *Treaties, etc.*, 1910, I, 976. As to preference of American to foreign creditors in attachment proceedings in American courts, see *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570, and *For. Rel.* 1910, 518-522.

³ See the article of Prof. J. H. Beale, *The jurisdiction of courts over foreigners*, 26 *Harvard Law Rev.* (1913), 193 *et seq.*; 283 *et seq.*

to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other Party.”¹

A peculiar condition is found in the French law which fails to give its national courts jurisdiction over suits between two foreigners. French courts, however, in view of the fact that they were not prohibited from taking jurisdiction, have assumed it in a long line of cases, so that while the rule leaves them without jurisdiction, the exceptions have narrowed the rule very greatly.² Belgium, which originally followed France, abolished this provision in 1876.

Article 14 of the French civil code contains a unique provision, its harshness being particularly striking in view of the leadership assumed by France in ameliorating the condition of aliens. This article provides:

“A foreigner, even though not a resident of France, may be cited before the French tribunals, for the execution of obligations contracted in France, with a Frenchman; and may also be sued in the French tribunals upon obligations contracted by him abroad, with a Frenchman.”

A French plaintiff may, therefore, compel a non-resident alien defendant to appear before the French courts. Esperson and other writers consider this an outrageous rule, and indeed judgments of French courts pronounced against an alien non-resident defendant who does not appear are not executed by foreign courts.³

The inability of non-resident alien representatives of a deceased alien to sue in some states of the United States for injuries resulting in death by wrongful act, notwithstanding the provisions of a treaty granting to aliens “protection and security for their persons and property and . . . the same rights and privileges as are granted to the natives”⁴ caused an amendment of the treaty of 1871 with Italy (an Italian subject was involved in the case cited) reading as follows:

¹ Treaty of Feb. 21, 1911 between the United States and Japan, art. 7, Treaty series, No. 558, p. 5, Malloy, *Treaties, etc.*, III (1913), 79.

² Jurisdiction in actions between foreigners, by A. Pillet, 18 *Harvard Law Rev.* 325.

³ Beale in 26 *Harvard Law Rev.*, 209 *et seq.*; Pillet in 18 *Harvard Law Rev.* 325 *et seq.*

⁴ *Maiorano v. B. & O. R. R. Co.*, 213 U. S. 268 at p. 274-275, decided by Mr. Justice Moody. The action was begun in Pennsylvania, under a statute of that state. See also *McGovern v. Philadelphia & R. Ry. Co.* (1914), 209 *Fed.* 975.

"The citizens of each of the high contracting parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of such relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."¹

The advantages of these rights are not apparently available to other aliens who by treaty of their national government enjoy most favored nation treatment.² Attention may again be drawn to the fact that the "equal protection" guaranteed in treaties does not signify an identity of rights with nationals, but merely an equal protection in such rights as are granted.

The execution of foreign judgments is an intricate and complicated branch of the law. Without entering into any discussion of the subject, four principles which govern the practice of the several important countries may be pointed out:

1. No execution is issued on a foreign judgment, but it is admitted as proof of its validity, either alone or with additional evidence of the court's jurisdiction over person and subject-matter, in a new action for a local judgment. When regarded as conclusive proof, the new action becomes a mere formality of registration. With numerous variations, this is the system adopted in Great Britain, the United States, Monaco, Peru, Russia, Servia, Switzerland and Uruguay.

2. An exequatur is issued on the foreign judgment without reëxamining it and without requiring reciprocity, provided it be regular in form, rendered by a court having jurisdiction, and its execution be compatible with local public policy. This system has been adopted by the Argentine Republic, Bulgaria, Italy, Portugal and the Congo.

3. The same system as the second, except that reciprocity is re-

¹Treaty of February 25, 1913, art. 1.

²Dictum, as to British subjects, in *McGovern v. Philadelphia*, 209 Fed. 975. Had the action arisen after the treaty with Italy had gone into effect, it is believed that the better reasoning would have given effect to the most favored nation clause. See 7 A. J. I. L. (1913) 370.

quired. In this class are Austria-Hungary, Germany,¹ Egypt, Spain, Brazil, Mexico and Roumania.

4. In the last system, the judgment is reëxamined before the exequatur issues. This is the practice of France, Chile, Denmark, Haiti, Luxemburg, Netherlands, Norway and Sweden.

Numerous treaties, which the civil law countries frequently conclude, regulate the effect and the execution of foreign judgments as between the contracting parties.²

§ 39. Private Rights.

In taking up the rights of the alien in private law, the ownership of real property may first be considered. The right to acquire immovables, by purchase or descent, and to own and dispose of them may be forbidden to aliens. While no longer the general rule, a few states, for economic or political reasons, still restrict the ownership of real property within their territory to nationals. This is still the case in some fifteen states of the United States, in Russia within certain districts, and in Roumania, and was the case in Turkey until 1867 and in England until 1870. Mexico forbids aliens to acquire real property within sixty miles of the frontier or thirty miles of the sea. In a few other countries, like Japan and Haiti, the right to own realty is limited.³ Fiore traces these restrictive provisions to the feudal system. The practice had its origin perhaps in a fear that control of national territory by foreigners opened too great a danger of foreign influence, domination or conflict. Some writers consider it curious that in countries in which the requirement of citizenship for the enjoyment of civil rights is of least force, as in the United States and Great Britain, where rights are based on domicile, the national territory should be regarded as so peculiarly sacred. The disability of an alien

¹ It seems, however, that the German courts refused to enforce against German insurance companies certain judgments obtained in California by American policyholders sustaining losses in the San Francisco earthquake and fire, notwithstanding that a reciprocal right would be granted in California. For. Rel. 1910, 522.

² Despagnet, *Dr. int. privé*, § 201 *et seq.* On the whole subject see Despagnet, *op. cit.*, §§ 190-209; Weiss, *op. cit.* V, 543-734; Piggott, F. T., *Foreign judgments and jurisdiction*, Hong Kong and London, 1908, 3 v.

³ Moore's Dig. IV, 43 *et seq.*; for law in the United States, see *ibid.* 32 *et seq.*

to hold real property in the United States may be removed by treaty,¹ and the treaty of 1778 between the United States and France allowed citizens of either country to hold lands in the other.² By reason of the existing restrictive legislation of many of the states, the federal government, as a matter of policy, would hardly now conclude treaties granting aliens the right to hold real property in the United States, though there appears little doubt of its power so to do.³ At common law aliens could take by act of a party but not by operation of law; and they may convey or devise to another, but such title is always liable to be divested at the pleasure of the state by office found.⁴ It has even been held that an alien enemy might take lands by devise until office found.⁵

A legal prohibition to own real estate, as was the case in Haiti in 1885, did not prevent the United States from making a claim on account of an injury to real property owned there by an American citizen, notwithstanding Haiti's defense of his legal inability to own such property. The United States contended that his title was merely defeasible and that he owned something, for the arbitrary spoliation of which by the government he had a claim for redress. Until legal proceedings are instituted to oust the alien, his inchoate interests should be protected, and even if his title was one of possession only, this must be protected until by due process of law he is dispossessed.⁶

The evolution of the right of succession to real property is characteristic of the history of the rights of aliens. The absolute prohibition to succeed which existed up to the eighteenth century was replaced by the imposition of severe taxes under the system of the *droit d'aubaine*. After the gradual abolition of the *droit d'aubaine*

¹ *Orr v. Hodgson*, 4 Wheat. 453.

² *Carneal v. Banks*, 10 Wheat. 181.

³ *Butler*, C. H., *Treaty-making power of the U. S.*, New York, 1902, II, § 330 *et seq.*; *Burr*, C. H., *Treaty-making power of the U. S.*, Philadelphia, 1912, p. 339 *et seq.* and *Ware v. Hylton*, 3 Dallas, 199; *Chirac v. Chirac*, 2 Wheat. 259; *Fairfax v. Hunter*, 7 Cranch, 603; *Hauenstein v. Lynham*, 100 U. S. 483; and *Geoffroy v. Riggs*, 133 U. S. 258.

⁴ *Hauenstein v. Lynham*, 100 U. S. 483; *Martin v. Hunter*, 1 Wheat. 304; *Gouverneur v. Robertson*, 11 Wheat. 332.

⁵ *Fairfax v. Hunter*, 7 Cranch, 603.

⁶ *For. Rel.*, 1885, pp. 525-526.

by statute and treaty, the right to succeed has been freely granted, though in some states it is still conditioned upon reciprocity.¹

As it is against the policy of the United States to decree forfeitures, treaties have usually provided that aliens who cannot take property by descent shall have the right to dispose of their property and remove the proceeds within a reasonable time. So, for example, article 2 of the treaty of May 8, 1848, between the United States and Austria-Hungary, provides:

“Where, on the death of any person holding real property, or property not personal, within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged, according to circumstances, and to withdraw the proceeds thereof, without molestation, and exempt from any other charges than those which may be imposed in like cases upon the inhabitants of the country from which such proceeds may be withdrawn.”²

The payment of a *droit de détraction*, or tax on the removal of alien property from the state, has since the beginning of the nineteenth century been practically abolished by statute and treaty.

The power to acquire, own and dispose of personal property is a universally recognized right of aliens. It is often guaranteed by treaty, subject merely to the payment of the same taxes as are paid by citizens. The following clause is typical of the treaties concluded by the United States:

“The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation or otherwise; and their heirs, legatees and

¹ *E. g.*, in Austria, Sweden and the United States. Art. 726 of the French civil code amended the liberal principles of the French revolutionary period which had completely abolished the *droit d'aubaine*. By the French law of July 14, 1819, art. 726 of the Civil Code, which conditioned the right to succeed upon diplomatic reciprocity, was repealed. This liberal principle was followed in the Belgian law of April 27, 1865 and has been adopted by Spain, Italy, Denmark, the Netherlands and Great Britain. Succession taxes are due from non-resident aliens on estates in the territory as from nationals.

² Malloy, *Treaties, etc.*, 1910, I, 34. See as to the construction of a similar treaty with Switzerland, *Hauenstein v. Lynham*, 100 U. S. 483.

donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country, where the said property lies, shall be liable to pay in like cases."¹

Consular conventions usually provide for the intervention of their national consul in the administration of the estates of deceased aliens, dying without local representatives.²

Rights in industrial and literary property are protected by treaties of reciprocity, or by collective conventions such as the Paris convention on industrial property of March 20, 1883 and the Berne convention on literary property of September 9, 1886. Compliance with the formalities of the local law is always required. The patent and trademark treaties concluded by the United States reciprocally assure domestic treatment to the respective citizens of the contracting parties. Legislation differs slightly from country to country.³ In the absence of treaty aliens are dependent upon the provisions of local law relating to the protection of aliens. In a case arising before the conclusion of the treaty between the United States and Germany an American inventor sought the assistance of the Department of State because of the use by the government of Germany of his invention, for which as an alien he could secure no patent. The Department of State answered:

"If the laws of the country afford no protection in such cases, it is not competent for this Government, by a diplomatic channel, to supply the

¹ Treaty of May 8, 1848 with Austria-Hungary, art. I, Malloy, *Treaties, etc.*, I, 34.

² R. S. 1709 *et seq.*, U. S. Cons. Regulations, § 389 *et seq.* But see *Rocca v. Thompson*, 223 U. S. 317; *In re Lis' estate*, 139 N. W. 300 and article by F. R. Coudert in 13 *Columbia Law Rev.* 181-201. See also *infra*, § 166.

³ Despagne, *Dr. int. privé*, § 85 *et seq.*, § 62 (France); Pradier-Fodéré, *op. cit.* IV, §§ 2219-2253; Darras, A., *Du droit des auteurs et des artistes dans les rapports internationaux*, Paris, 1887; Silvy, E., *Des droits des auteurs et des artistes sur leurs oeuvres au point de vue international*, Grenoble, 1894; *Unions et accords en matière de protection de la propriété littéraire et artistique* by Röthlisberger, 1 R. D. I. privé (1905), 300-307; 1908, 88-110; *De la révision en 1908 de la convention de Berne* by J. Dubois, 36 *Clunet* (1909), 954-982; Brun, J. L., *Les marques de fabrique et de commerce en droit français, droit comparé et droit international*, Paris, 1895.

omission, or to procure either protection for an American inventor or compensation for his invention."¹

Nor, in general, will a country grant greater rights to the owner of a patent or trade-mark than he has in his own country. Thus, the German Supreme Court in a decision of May 8, 1907 held that an alien invoking for his goods the protection of the German law must show that his merchandise is equally protected in his own country, *i. e.*, that the remedy which he seeks under the German law is one that is secured to him by the law of his own country.²

The United States copyright law of March 4, 1909 provides, section 8:

"That the author or proprietor of any work made the subject of copyright by this Act, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this Act: *Provided, however,* That the copyright secured by this Act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only:

"(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

"(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this Act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

"The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this Act may require."

In accordance with these provisions requiring identical treatment or reciprocal treatment to Americans abroad, the President has issued proclamations extending the benefits of our Copyright Act to citizens

¹ Mr. Cadwalader, Act'g Sec'y of State, to Mr. Broadwell, July 28, 1875, Moore's Dig. VI, 754.

² Zeitschrift für Industrierecht, 1906, p. 261 cited in Singer, Trade-mark laws of the world, 1913, p. 223. In various countries of South America, on the other hand, the first person to register a trade-mark, regardless of his ownership, receives protection, even against the rightful owner. Many alien owners of trade-marks are thus defrauded.

of practically all the civilized countries. Under section 1 (e) of the Act, extending protection to the mechanical reproduction of musical works, additional proclamations have been issued in favor of many countries.

The limitations on the property rights of aliens in certain national resources, *e. g.*, national vessels, national mines, and other kinds of property have already been noted. In other matters of private law aliens enjoy practically the same rights as nationals. In family law, a few restrictions may be noted. Countries of the white race frequently prohibit intermarriage with those of other races. In some countries, aliens are limited in their rights of adoption and guardianship. In France, for example, an alien cannot be a guardian.¹ In commercial matters, the alien often labors under minor disabilities; for example, under the French bankruptcy laws, an alien cannot, by an assignment for the benefit of his creditors, release himself from personal liability for his debts.

§ 40. Transient and Domiciled Aliens.

From what has gone before it will have been seen that there are different categories of aliens, differing in the degree of fixity which their residence possesses. For the purpose of examining their rights and obligations, we may distinguish two important classes, transient and domiciled aliens. By the municipal law of some states the domiciled alien occupies a position, in practically all respects except the exercise of political rights and duties, the same as that of the national. This is the case in France and a few other countries. In the Latin American countries the domiciled alien is required to fulfill many obligations from which the transient alien is exempt. Publicists differ in the emphasis laid upon the importance of the distinction.² Treaties often fail to take account of it. Unquestionably, however, the fact that the domiciled alien is more closely identified with the country

¹ Weiss, *op. cit.* II, 228 *et seq.* De la tutelle des mineurs d'après les principales législations de l'Europe, by E. Lehr, R. D. I. 1902, pp. 315-340; Zur Frage der Bevormundung fremder Staatsangehöriger, by Scheuffler, 1 Ztschr. f. int. privat u öffent. Recht (1890), 181-186.

² Phillimore, *op. cit.* II, 6 considers it of great importance; Pradier-Fodéré, *op. cit.* III, § 1371, does not.

of residence than the transient alien is of great importance in determining their respective rights and duties, both in the country of residence and with respect to the home or national state.¹

In the United States and Great Britain domicile plays an even more important part than nationality in determining the civil status of an individual. In the matter of the capture of private property at sea by a belligerent, such property is regarded as enemy or neutral not according to the nationality of its owner, but according to the territory in which the owner has his commercial domicile—this on the ground that his industry adds to the strength of the country in which it is carried on.² At an early period in the development of continental law domicile preceded nationality (where they were not identical) as the criterion of a man's personal status. In this respect nationality has replaced domicile on the continent.

In international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as those possessed by and imposed upon the citizens of that country.³ In some countries, as in Mexico, the transient foreigner cannot acquire real estate. The transient foreigner, on the other hand, is not generally subject to personal taxes. He can, in some countries, as in Belgium and Brazil, be more easily expelled than the domiciled alien.⁴ The domiciled alien owes to the state of his residence practically all the duties of the native except such as have a political character; for example, he is subject to the same taxes, and the United States, at least, has always considered that he is subject to service in the civic guard, and may be required to aid in preserving public order and even to support and defend, in all ways except general military service, the interests of the state whose local protection he enjoys.⁵ Both the United States and Great Britain

¹ Phillimore, *op. cit.*, II, 6; Fiore, *Nouv. dr. int. pub.* (Antoine's trans.), § 647; Pomeroy, Woolsey's ed., 249.

² Westlake, *op. cit.*, I, 212. In France and other continental countries, nationality determines enemy or neutral character, as it determines status and capacity.

³ *Lau Ow Bew v. U. S.*, 144 U. S. 47.

⁴ *Bar, op. cit.*, 221.

⁵ *Supra*, p. 65. Mr. Fish once expressed the opinion that domiciled aliens might be required to serve on juries and in the fire department and to perform similar

have on occasion intimated that even military service might be required of permanently domiciled aliens, subject always to the alternative of leaving the country.¹ In numerous treaties between the Latin American countries only transient aliens are exempted from military service and from extraordinary contribution, forced loans, military requisitions, and similar burdens which nationals must bear.²

On principle, indeed, permanently domiciled aliens should share the normal burdens of the native inhabitants of the country in which they have established their permanent residence. This applies especially to the sacrifices which civil commotion, insurrection and civil war impose upon the inhabitants. The Latin American countries have suffered severely from the apparent unwillingness of European governments to share this view. The citizen domiciled abroad escapes military service in his own country, jury duty, extraordinary taxes, and all accidents of national life, such as riots, war, etc. By reason of his alienage, he escapes the most burdensome of these duties in the country of his domicil and is only slightly affected by the calamities of local life, having often, indeed, as has been proved by Latin American experience, a claim to preferential treatment on the assumed ground of the negligence of the national government in permitting a revolution to arise, or in not suppressing it.³

Domiciled aliens like transient aliens are protected by their national governments against ill-treatment, arbitrary proceedings or irregular exercise of the rights of local authorities, denial of justice or violation of treaties or the principles of international law. By the law of 1907, the United States has sought, in the case of naturalized citizens, to prevent any unfair claim upon its protection by withdrawing it on evidence (rebuttable on specific grounds) of a limited residence abroad—two years in the country of nativity, or five years in any other country.⁴ duties. Mr. Fish, Sec'y of State, to Mr. Wing, April 6, 1871, Moore's Dig. IV, 58. See also Pomeroy, *op. cit.* 249.

¹ *Supra*, p. 68. See also Lomonaco, *op. cit.*, 218; Fiore, *op. cit.*, § 647.

² Pradier-Fodéré, *op. cit.* III, § 1373.

³ *Infra*, § 97. Lisboa, *Les fonctions diplomatiques*, p. 190; Pradier-Fodéré, III, § 1371. Mr. Seward, however, declined to extend protection to permanently domiciled aliens (citizens of the U. S.) in the Panama Riot claims. British Naturalization report, App. 64. See also *infra*, § 326.

⁴ *Infra*, §§ 242, 330.

As applied to native citizens, protection is still extended notwithstanding foreign domicile, though, as will be seen hereafter, that is taken into account in determining both the title to and the extent of protection. One of the justifications for such protection in the case of citizens domiciled abroad is the fact that having no political share in the government of their domicile, they are denied that expression of disapproval and privilege of bringing about a change of administration which native citizens enjoy, and that ultimate foreign protection is the only sanction that they have for asserted rights. A freer extension of political rights to domiciled aliens without an attempt to impose local citizenship upon them would remove one important element of justification for foreign intervention in Latin America.

§ 41. Subjection to Territorial Law.

In return for the protection of person and property which by municipal law and treaty the country of residence assures to the alien, he owes obedience to the local law or what has been called "temporary allegiance" to the state.¹ This rule applies to the persons and property of aliens entering the territory, and from it only certain privileged classes of aliens are exempt. These include foreign sovereigns and diplomatic officers, foreign public ships, and in the case of countries in which extraterritorial privileges are exercised, aliens governed by the so-called capitulations or special treaties. By treaty, states usually provide that their consuls shall have a limited jurisdiction over their merchant vessels in matters not affecting the peace of the port.² An involuntary entrance of a vessel, under duress or by stress of weather, has been held not to be such a submission to local law as would properly incur the imposition of local penalties.³ The plenitude of territorial jurisdiction and the submission of aliens to local

¹ Sec'y of State Webster in Thrasher's case, Webster's Works, VI, 524; *Carlisle v. U. S.*, 16 Wall. 147; Wharton's Dig. II, § 203; Moore's Dig. IV, 9-17. See also Pradier-Fodéré, *op. cit.* I, § 403; III, § 1365; Lomonaco, *op. cit.*, 217; Despagnet, *Dr. int. public*, § 342; Cockburn, *Nationality*, 139; Cushing in 7 Op. Atty. Gen. 229, 235.

² Moore's Dig. II, 272 *et seq.*

³ Cases referred to in Moore's Dig. II, 339 *et seq.*, and *The Alliance (U. S.) v. Venezuela*, Feb. 17, 1903, *Ralston*, 29, 32.

law will be considered under two of its most important aspects, taxation and criminal jurisdiction.

The power to impose taxes is an attribute of sovereignty, and where the person or the property in question is a proper subject of taxation the species of tax and its amount is left to the government exercising the power. So long as the tax is uniform in operation and may fairly be considered a tax and not a confiscation or unfair imposition, no successful representation can be made to a foreign government on behalf of the aliens affected. Complaints of excessive taxation are properly questions for submission to local courts.¹ Unjust or illegal exactions cannot, however, be enforced under the disguise of taxation.² The territoriality of taxation has been adopted as a practically universal principle, the tax affecting property or person in the territory or transactions there undertaken. The alien is properly subject to the ordinary industrial, excise, internal revenue and license taxes and duties and to property and income taxes.³ The transient alien, however, is internationally exempt from personal taxes.⁴

In the absence of treaty, foreigners may be more heavily taxed than nationals, but at the present day, if not by statute then by treaty, the alien has generally been secured against any discrimination in taxation as against the native inhabitant.⁵ The alien is often required

¹ Mr. Fish, Sec'y of State, to Mr. Davis, min. to Germany, Nov. 21, 1874, Moore's Dig. IV, 20; Mr. Bayard, Sec'y of State, to Mr. Cox, min. to Turkey, Nov. 11, 1885, For. Rel., 1885, 878; Sec'y of State Hay to Mr. Harris, amb. to Austria (case of H. M. Braem), For. Rel., 1899, 48, 50. See other state papers in Moore's Dig. IV, 20 *et seq.* and II, 55 *et seq.*

² Mr. Fish, Sec'y of State, to Mr. Mantilla, Jan. 11, 1876, Moore's Dig. IV, 21.

³ Heffter (Geffcken-Bergson) *op. cit.*, § 62, pp. 142-145. Des bases légitimes des impôts en droit international by E. Lehr, 35 R. D. I. (1903), 547-555.

⁴ The imposition of a head tax on immigrants or a tax on sojourn, which some countries still exact, is not in derogation of this principle. Heffter, *op. cit.*, 144; Mr. Porter to Mr. Emmet, min. to Turkey, June 8, 1885, For. Rel., 1885, 848. The resident alien, even though not domiciled, is subject to personal taxes in France, and probably in other countries. Decision of the Conseil d'Etat, Despagnet, Dr. int. privé, 131.

⁵ Certain kinds of foreign business concerns, particularly life insurance companies, have occasionally been discriminated against in taxation and other ways, even in the United States. In a recent case, the federal government declined to interfere with state legislation in Iowa, Missouri and Nebraska taxing foreign insurance companies more heavily than national companies—this notwithstanding treaties by

to pay special taxes, for sojourn, for license to do business or for other reasons.¹ If the taxes are reasonable and apply uniformly to all aliens, foreign governments recognize the legality of the practice. It may be justified as compensation for an escape from certain political burdens. A discrimination against the nationals of one or more countries alone would be an unfriendly act, and give rise to diplomatic or more forceful measures.

The matter of double taxation, while largely adjusted by statute or treaty, occasionally presents interesting problems. Thus, France taxes stocks and bonds in France, regardless of who owns them, whereas Switzerland taxes the income of residents from whatever source derived. Cases of double taxation are becoming less frequent, as municipal legislation recognizes the injustice of the practice.² If the tax is exorbitant, so that it necessarily will result in driving aliens out of business, foreign governments will protest. A successful protest was raised against the proposed enforcement of a Haitian law of 1876 which would have had this effect.³

§ 42. Criminal Proceedings.

It is a general principle of international law that every nation, which Belgian and Swiss companies were in a more favorable position than others. The United States answered a British protest by referring the British companies to the courts if they considered a treaty to have been violated, but declined to conclude a treaty by which the freedom of state legislation might be hampered. For. Rel., 1899, 345-348. See also H. T. Kingsbury in 1911 Proceeding of the Amer. Soc. of Int. Law, 215-218.

¹ In Maine, statutes prescribing pedler's licenses for aliens were held unconstitutional as a discrimination between aliens and citizens. *State v. Montgomery*, 94 Me. 192; *State v. Mitchell*, 97 Me. 66.

² Lehr in 12 R. D. I. (1880), 108 and 28 Clunet (1901), 722; 14 to 22 *Annuaire of the Institute*, and *supra*, p. 22, note 3.

³ Haiti at various times has imposed discriminatory taxes and other conditions upon foreigners. The United States on numerous occasion (1876, 1893, 1897, 1903 and others) has protested against these discriminations (which were usually directed against foreign business), particularly as the treaty of Nov. 3, 1864 provided for equality in taxation. For. Rel., 1904, 371-384; For. Rel., 1907, 728-742. The last protest was made after the abrogation of the treaty. It appears to have been successful. A small license fee on foreigners engaged in business was apparently not objected to. See also decision of Day, arbitrator, in *Metzger (U. S.) v. Haiti*, Oct. 18, 1899, For. Rel., 1901, 262, 272.

whenever its laws are violated by anyone owing obedience to them, whether citizen or alien, has a right, free from the interference of other states, to inflict the penalties incurred by the transgressor if found within its jurisdiction, provided that the laws themselves, the methods of administering them, and the penalties prescribed are not in derogation of civilized codes.¹

The criminal procedure of foreign countries frequently contains harsh features and is deficient in many safeguards which American law provides for the benefit of the accused. This constitutes no ground for diplomatic complaint, the right of the United States or other foreign country being confined to a demand that its citizen be given the full and fair benefit of the system which does exist, without discrimination as against natives or other aliens.² An alien must submit to the inconvenience of proceedings that may be brought in accordance with law upon any *bona fide* charge that an offense has been committed, even though the charge may not be sustained.³ On this ground the claims of innocent citizens of the United States arrested in foreign countries on suspicion of having violated the local law are usually rejected.⁴ Even when a conviction by a lower court is reversed, for error, by an appellate court, there is no foundation, legally, for an international claim, although equitable considerations might lead to a moral request for indemnification on account of incidental imprison-

¹ Mr. Marcy, Sec'y of State, to Mr. Jackson, chargé at Vienna, Austria, Jan. 10, 1854, Moore's Dig. II, 88; Bullis (U. S.) v. Venezuela, Feb. 13, 1903, Morris' Report, Sen. Doc. 317, 58th Cong. 2nd sess., 375-376.

² Mr. Marcy, Sec'y of State, to Mr. Jackson, chargé at Vienna, Apr. 6, 1855, Moore's Dig. II, 89; VI, 275. See state papers quoted in Moore's Dig. II, 90 *et seq.*; VI, 273 *et seq.* and Tchernoff, *op. cit.*, 504. See also the illuminating opinions in *In re Neely*, 103 Fed. 626 and in *Neely v. Henkel*, 180 U. S. 109 (by Justice Harlan).

³ Elihu Root in 4 A. J. I. L. (July, 1910), 527. See Trumbull (Chile) v. U. S., Aug. 7, 1892, Moore's Arb. 3255-3261, and the following cases before the U. S.-Mexican commission of July 4, 1868: Collier (*ibid.* 3244), Atwood (*ibid.* 3249), Cramer (*ibid.*, 3250). See also decision of Hamburg Senate in case of White (Gt. Brit.) v. Peru (1864), Moore's Arb. 4967. See also *La Forte* (Gr. Brit.) v. Brazil, Jan. 5, 1863, *ibid.* 4925, and claim of Higginson v. Peru, Baty, 164; Pittard, *Protection des nationaux*, 250; Martens, *Traité*, III, 141.

⁴ *E. g.*, Mix case v. Austria, For. Rel., 1894, 23-26; Mr. Marcy to Mr. Richter, Feb. 21, 1854, Wharton's Dig. II, 515; Hannam (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3243.

ment. The judicial proceedings, however, must be regular and conducted in good faith and in accordance with the law and with the forms of civilized justice, and must not be arbitrary or unnecessarily harsh or discriminate against the alien on account of his nationality.¹ No violation of law on his part will deprive the alien of this limited protection of his government, which has the right to insist that he shall be tried and punished in accordance with law. President Cleveland in his annual message of 1886 thus expressed the principle:

"When citizens of the United States voluntarily go into a foreign country they must abide by the laws there in force, and will not be protected by their own government from the consequences of an offense against those laws committed in such foreign country; but . . . if charged with crime committed in the foreign land a fair and open trial, conducted with decent regard for justice and humanity, will be demanded for them. With less than that this government will not be content when the life or liberty of its citizens is at stake."²

The representatives of foreign governments often undertake by active attendance to watch criminal proceedings in which their countrymen are parties in interest.³ On various occasions in the diplomatic history of the United States claims have been successfully prosecuted by the Department of State or allowed by international commissions on the following grounds:⁴ Unjust or unlawful arrest or detention;⁵

¹ Extracts quoted in Moore's Dig. VI, 698 and 273-285. Ballenger (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3243; Van Bokkelen (U. S.) v. Haiti, May 24, 1888, *ibid.* 1807.

² Annual Message, Dec. 6, 1886, For. Rel., 1886, vii.

³ Mr. Bayard, Sec'y of State, to Mr. Jackson, min. to Mexico, July 26, 1886, Moore's Dig. VI, 281.

⁴ It may be here noted that international tribunals have generally, in the absence of a prohibition in the protocol, assumed the right to pass independently upon the justifiability of an arrest and the legality of the incidental and subsequent proceedings. Shaver (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3285; Cauty (Gt. Brit.) v. U. S., *ibid.* 3309.

⁵ Pratt (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3280-3282; Jonan (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3251; Patrick (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3287 (charge without foundation, though released after brief detention); Underhill (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 45, 51; Shaw (Gt. Brit.) v. France, 1883, 19 Hertslet's Comm. Treaties, 201-203. Claims have often been enforced on account of the unlawful detention of vessels. See, *e. g.*, John S. Bryan (U. S.) v. Brazil, Oct. 15, 1842, Moore's Arb. 4613; Whaling vessels (U. S.) v. Russia,

unduly harsh or oppressive or unjust treatment during arrest, detention, trial or imprisonment, whether the accused was guilty or not;¹ unnecessarily long detention or undue or needless delay in trial;² a punishment disproportionate in severity to the offense charged;³ a violation of municipal law or treaty;⁴ lack of jurisdiction on the

Aug. 26, 1900, For. Rel., 1902, App. I; *Col. Lloyd Aspinwall* (U. S.) *v.* Spain, 1870, Moore's Arb. 1007, 1014; *Good Return* (U. S.) *v.* Chile, Dec. 6, 1873, *ibid.* 1466 (note); *Phare* (France) *v.* Nicaragua, Oct. 15, 1879, *ibid.* 4870; *Lottie May* (Gt. Brit.) *v.* Honduras, March 20, 1899, For. Rel., 1899, 371; *Masonic* (U. S.) *v.* Spain, Feb. 28, 1885, Moore's Arb. 1055, 1062. See also Moore's Dig. VI, §§ 1011-1012.

But an arrest or detention, even though charge is not proved, gives rise to no claim unless there is evidence of malice or lack of probable cause or disregard of due process of law. *Borden* (U. S.) *v.* Chile, Aug. 7, 1892, Moore's Arb. 3261-3265; *Horatio* (U. S.) *v.* Venezuela, Dec. 5, 1885, *ibid.* 3026.

¹ *Baldwin* (U. S.) *v.* Mexico, April 11, 1839, Moore's Arb. 3235-3240; *Gahagan* (U. S.) *v.* Mexico, *ibid.* 3240; *Bolles & Christian* (U. S.) *v.* Mex., Mar. 3, 1849, *ibid.* 3242; *Barnes* (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 3247; *Nautilus*, etc., Co. (U. S.) *v.* Mexico, *ibid.* 3251; *Griffin* (U. S.) *v.* Spain, Feb. 12, 1871, *ibid.* 3252; *Cabias*, *ibid.* 3253; *Edwards*, *ibid.* 3268; *Strong*, *ibid.* 3269; *McKeown*, *ibid.* 3311; *Powers*, *ibid.* 3274; *Van Bokkelen* (U. S.) *v.* Haiti, May 24, 1888, *ibid.* 1807. Cases before Spanish Treaty Claims Com., Final Report, May 2, 1910, p. 14.

Mr. Buchanan, Sec'y of State, to Mr. Campbell, Dec. 11, 1848, Moore's Dig. VI, 274 (holding U. S. citizen "incommunicado" in Cuba); Mr. Conrad, Acting Sec'y of State, to Mr. Peyton, Oct. 12, 1852, Moore's Dig. VI, 275 (refusal to hear testimony on behalf of defendant). Cases of U. S. citizens arrested in Guatemala, For. Rel., 1894, 302-315 (not served with warrants or informed of charges against them; not permitted to see consul's messenger; gross irregularities in procedure). Sol. Gen. Richards, Feb. 7, 1898 in case of *Culleton* (U. S.) *v.* Colombia, 22 Op. Atty. Gen. 32; *Baty*, *op. cit.*, 118-122, and Moore's Dig. VI, § 1012.

² *Rahming*, *Eneas* and *Binney* (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 3282; *Nautilus*, etc., Co. (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 3251; *Barnes* (U. S.) *v.* Mexico, *ibid.* 3247; Mr. Bayard, Sec'y of State, to Mr. Ryan, min. to Mexico, June 28, 1890, Moore's Dig. VI, 281.

³ *Baldwin* (U. S.) *v.* Mexico, April 11, 1839, Moore's Arb. 3235-3240; *Halstead* (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 3243; *Montgomery* (U. S.) *v.* Spain, Feb. 12, 1871, *ibid.* 3272; *Le More* (France) *v.* United States, Jan. 15, 1880, *ibid.* 3313.

⁴ *Molière* (U. S.) *v.* Spain, Feb. 12, 1871, Moore's Arb. 3252; *Reading* (Gt. Brit.) *v.* U. S., May 8, 1871, *ibid.* 3283, 3285; *Brito* (U. S.) *v.* Spain, Feb. 12, 1871, *ibid.* 3252; *Jones* (U. S.) *v.* Spain, *ibid.* 3253 (excessive bail); *De Luna* (U. S.) *v.* Spain, *ibid.* 3276; *Lowe* (U. S.) *v.* Spain, *ibid.* 3270; *Montejo* (U. S.) *v.* Spain, *ibid.* 3277; *Mevs* case *v.* Haiti, For. Rel., 1893, pp. 358, 378, 381; Master of Russian bark *Hans v.* U. S., President's message, Dec. 5, 1898, For. Rel., 1898, lxxxi, 31 Stat. L. 1010; *Van Bokkelen v.* Haiti (imprisonment in violation of treaty) Moore's Dig. VI, § 1013. Cases before Spanish Treaty Claims Commission, Final Report, 14.

part of the trial court,¹ or in general a denial of justice.² A detention and discharge without trial throws the burden on the government to show due process of law, and in the absence of such proof, international tribunals have allowed damages.³ While military law, operating in time of war only, gives military officers and courts a greater discretion in the matter of arrest, detention and imprisonment than is accorded to civil authorities in time of peace, they must nevertheless comply with the requirements of due process of law.⁴ Treaties usually provide for due process of law in the litigation, civil or criminal, to which the respective citizens of the contracting states are parties, by stipulating for free access to courts, formal charges, an opportunity to be heard, to employ counsel, to examine witnesses and evidence, and a guaranty of essential safeguards against a denial of justice. In the absence of unduly harsh or arbitrary treatment by an authority of the state, claimants are expected to resort to their local remedies against the persons, often minor police officers, who have been guilty of the wrongful arrest or false imprisonment.⁵

The decision of a foreign tribunal against a citizen of the United States on criminal charges will only be protested against on the following broad grounds:

“(1) Undue discrimination against the petitioner as a citizen of the United States in breach of treaty obligations, or

“(2) Violation of those rules for the maintenance of justice in judicial enquiries which are sanctioned by international law.”⁶

¹ *Carmony (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3287; *Le More (France) v. U. S.*, Jan. 15, 1880, *ibid.* 3313; and other cases in Moore's Arb. 3280 *et seq.*

² *Infra*, § 129.

³ *Stovin (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3283; *Canty (Gt. Brit.) v. U. S.*, *ibid.* 3309; *Barnes (U. S.) v. Mexico*, July 4, 1868, *ibid.* 3247.

⁴ See cases reported in Moore's Arb. 3265 *et seq.*; see especially the elaborate dissenting opinion of Aldis, commissioner, in the French-United States commission of January 15, 1880, in Dubos' case, Moore's Arb. 3323 *et seq.* The same rule prevails in cases of martial law. Moore's Dig. II, § 196; VI, §§ 1016-1017; Howland's Digest of Opinions of Judge Advocates General, 1078-1081.

⁵ *Oberlander & Messenger (U. S.) v. Mexico*, March 2, 1897, For. Rel. 1897, 382, 388. Warren's case, Moore's Dig. VI, 661; case in England, *ibid.*, 670; Waller's case, *ibid.*, 670; cases in Honolulu, *ibid.*, 671, and other cases, *ibid.*, § 987.

⁶ Mr. Bayard, Sec'y of State, to Mr. Morrow, February 17, 1886, Moore's Dig. VI, 280; II, 92.

As a general rule, it may be said that the right to protest against legal proceedings abroad and even against errors of foreign courts can only be based upon an allegation of a denial of justice.¹ Mr. Marcy expressed this principle as follows:

“If a native-born citizen of the United States goes into a foreign country and subjects himself to a prosecution for an offense against the laws of that country, this Government can not interfere with the proceedings, nor can it claim any right to revise or correct the errors of such proceedings, unless there has been a willful denial of justice, or the tribunals have been corruptly used as instruments for perpetuating wrong or outrage.”²

The willingness of foreign governments to permit this practically unrestricted jurisdiction to be exercised by local courts over their citizens abroad is predicated upon the existence of certain conditions:

1. The existence of regular courts and of laws assuring to the alien the administration of civilized justice, on terms of equality with nationals.

2. The independence of the courts, and an assurance of their impartiality and good faith.

3. The justiciability of the case before the law courts.

4. The competency of the courts and their inclination to pass upon the case without unnecessary delay.

5. Respect of the local government for the decisions of its own courts.³

To the general rule that the criminal jurisdiction of a state is limited to offenses committed within its territory, or if committed abroad, to offenses of its own citizens, certain states by municipal law have made important exceptions by undertaking to punish aliens for crimes committed abroad. The pretension to this jurisdiction lacks both a territorial basis in the locality of the crime and a personal basis in the nationality of the accused. It is disapproved by the United States and Great Britain, and in 1886 the attempt of Mexico to en-

¹ As will be seen hereafter (*infra*, § 127 *et seq.* doubt and uncertainty arise only in the application of the rule.

² Mr. Marcy, Secretary of State, to Baron de Kalb, July 20, 1855, Moore's Dig. IV, 11.

³ Leval, G. de, *La protection diplomatique*, Bruxelles, 1907, pp. 93-98.

force it in the Cutting case became the subject of a sharp diplomatic controversy.¹ The claim to such jurisdiction, which in some form is found in the penal codes of most civil law countries, is founded upon the relation between the offense and the welfare of the state or its nationals, so that self-defense is by these countries invoked in its support. Most of them undertake to prosecute aliens who, while abroad, have committed crimes against the safety of the state or have counterfeited its seal or currency.² Only a few go so far as to punish crimes committed abroad against subjects of the state,³ which assertion of extraterritorial jurisdiction is too extensive to command general acquiescence.

Extradition treaties exemplify the mutual coöperation of states to prevent offenders from escaping the penalty of crime by departure from the territorial jurisdiction.

§ 43. Limitations upon Territorial Jurisdiction—Extraterritoriality.

There is also an exception, in the case of certain oriental countries, to the rule that aliens are under the complete territorial jurisdiction of the state of residence. Owing to the deficient civilization of these countries and fundamental differences in law and social habits, the countries of European civilization have stipulated for a certain exemption for their citizens from the operation of local law. This con-

¹ Cutting was finally released (though Mexico contested the right of the United States to interpose in his behalf), because the Mexican plaintiff withdrew his action for libel, committed in the United States.

On the Cutting case, see Mr. Moore's able "Report on extraterritorial crime," Washington, 1887, which contains an exhaustive discussion of the whole subject. See also Moore's Dig. II, §§ 200-202; Rolin in 20 R. D. I. (1888), 559; Hall, 207; Westlake, I, 261-263; Oppenheim, I, 203-205.

² *E. g.*, France, Germany, Austria, Belgium, Netherlands, Switzerland, Hungary, Italy, Luxemburg, Greece, Norway, Sweden, Russia, Spain and Brazil; but not Denmark, Portugal or Great Britain. Moore's Dig. II, 258; Hall, 207-208. The Institute of International Law approves this legislation, but adds to the condition that the "acts contain an attack upon [the state's] social existence or endanger its security," the further condition "when they are not provided against by the criminal law of the territory where they take place." 7 *Annuaire*, 156-157.

³ *E. g.*, Greece, Mexico and Russia and under various conditions and limitations, Austria, Hungary, Italy, Brazil, Sweden and Norway. This was the question involved in the Cutting case.

dition is called extraterritoriality. By treaty or custom these countries have surrendered a considerable portion of their jurisdiction over aliens to the states of European civilization, who exercise jurisdiction over their own nationals by courts and authorities established and regulated by their own municipal legislation.¹ Jurisdiction is usually exercised by the consuls or diplomatic officers of the foreign states and, except in Turkey, it is customarily confined to persons of their own nationality. While the system in practically all of the extraterritorial countries rests upon treaty, in the Ottoman empire it is based upon custom and certain treaties called Capitulations.² This explains the fact that consuls of treaty powers in Turkey may exercise jurisdiction and grant protection to nationals of other treaty powers or even of non-treaty powers, which in other extraterritorial countries they cannot do.³ The countries still under extraterritoriality, from which class Japan has only recently emerged, are China, Morocco, Muscat, Persia, the Barbary states, Siam, Egypt, Turkey, Bulgaria, and a

¹ The statutes of the United States began with the act of August 11, 1848, 9 Stat. L. 276. The statutes are now consolidated in §§ 4083-4130, Revised Statutes. See Moore's Dig. II, 613 *et seq.*; U. S. Consular Regulations (1896), §§ 612-653; Instructions to Diplomatic Officers of the U. S. (1897), §§ 200-240, p. 79 *et seq.* In Great Britain, foreign jurisdiction is now governed by the Foreign Jurisdiction Act of 1890, 53 & 54 Vict. c. 37. See Piggott, F., *Exterritoriality, Hong Kong, 1907*; Hall, *Foreign powers and jurisdiction*, § 59 *et seq.* The treaty provisions of the U. S. are found in Moore, *Extradition*, Boston, 1891, I, 100, note 5; the British treaty provisions in the Appendix to Piggott, *op. cit.*, 273 *et seq.*

² Pelissié du Rausas, G., *Le régime des capitulations dans l'Empire ottoman*, 2d ed., Paris, 1910-11, 2 v.; Arminjon, P., *Étrangers et protégés dans l'Empire ottoman*, Paris, 1903; Rey, F., *De la protection diplomatique et consulaire dans les échelles du Levant et de Barberie*, Paris, 1899; Über die Exterritorialität der Ausländer in der Türkei mit Rücksicht auf die Gerichtsbarkeit in Civil und Strafprozessen, by F. Meyer. 1 Jahrbuch für Rechtswissenschaft, 1895, pp. 95-190; Turkish capitulations and the status of British and other foreign subjects residing in Turkey, 21 Law Quar. Rev. (1905), 408-425; Hinckley, Frank E., *American consular jurisdiction in the Orient*, Washington, 1906; Brown, Philip M., *Foreigners in Turkey; their juridical status*, Princeton, 1914. Consular jurisdiction in the Levant and the status of foreigners in the Ottoman law courts, by Travers Twiss, 8th Annual Conference (1880) of the Asso. for the reform and codification of the law of nations, 27-51. *Les étrangers devant les tribunaux consulaires et nationaux en Turquie*, by E. R. Salem, 18 Clunet (1891), 393-425; 795-809; Moore's Dig. II, 662 *et seq.*

³ Moore's Dig. II, 596 *et seq.*; *Maria Luz (Peru) v. Japan*, Emperor of Russia, arbitrator, Moore's Arb. 5034-5036; *For. Rel.*, 1873, I, 524-553.

few minor semi-barbarous states.¹ The criminal jurisdiction of consuls is usually limited to their own nationals; natives guilty of crimes or injuries against foreigners, must as a rule be prosecuted in the local courts. The extent of the exemption from local law depends almost entirely upon treaty, and may differ from country to country and with respect to the nationals of different states. The system of protectorates with its incidental wide foreign jurisdiction and the system of mixed courts, *e. g.*, in Morocco, Tunis, Tripoli, Shanghai and other places, is a phase of extraterritorial jurisdiction.

§ 44. Equality of Alien and National not always Internationally Sufficient.

The statement is frequently made, and is undoubtedly true, that an alien establishing himself abroad must normally accept for his protection the institutions, whether of government or of justice, which the inhabitants of the state find suitable to themselves. Foreigners, therefore, are subject to the local courts and authorities, and not to separate jurisdictions, and their own governments will not normally interfere for their protection so long as they enjoy equal treatment with natives.²

¹ Moore's Dig. II, §§ 259-291, pp. 593-755; Sen. Misc. Doc. 89, 47th Cong. 1st sess., memorandum from Secretary of State; Heyking, A., *L'extraterritorialité*, Berlin, 1889; Hinckley, F., *American consular jurisdiction in the Orient*, Washington, 1906; Martens, F. F., *Das Consularwesen u. die Consularjurisdiction im Orient*, Berlin, 1874; Lippmann, *Die Konsularjurisdiktion in Orient (historical)*, Leipzig, 1898; Torres Campos, M., *Bases de una legislación sobre extraterritorialidad*, Madrid, 1896; Ravant-Bignon, R., *Du droit de police des consuls dans les pays hors chrétienté*, Paris, 1905; Rioche, Y., *Les juridictions consulaires anglaises dans les pays d'Orient, etc.*, Paris, 1904. See also for *Egypt*, Scott, J. H., *The law affecting foreigners in Egypt*, Edinburgh, 1907; Lamba, H., *De l'évolution de la condition juridique des Européens en Egypte*, Paris, 1896; for *China*, Koo, V. K. W., *The status of aliens in China*, New York, 1912. *The government of the foreigners in China*, by A. M. Latter, 19 *Law Quar. Rev.* (1903) 316-325. *Condition des étrangers en Chine* by Tou Fa Scié, 2 *R. D. I. privé*, 1906, 110-120; for *Morocco*, Saurin, D., *De la condition juridique des étrangers au Maroc au point de vue civil*, 34 *Clunet* (1907), 5-19; 284-294; for *Persia*, *La condition juridique des étrangers en Perse*, by James Greenfield, 34 *Clunet* (1907), 257-272; 973-985; *Des rapports d'affaires des Européens avec la Perse*, 35 *Clunet* (1908), 1064-1069; for *Siam*, *De la condition juridique des étrangers et de l'organisation judiciaire au Siam*, by A. Dauge, 27 *Clunet* (1900), 461-477; 704-716; *De la condition juridique des étrangers au Siam* by G. Padoux, 35 *Clunet* (1908), 693-713; 1037-1054.

² Westlake, *Chapters on international law*, 103; Pradier-Fodéré, III, § 1365. 7 Op.

This principle has become of special importance in the Latin-American countries, where exceptions from it have been imposed, on occasion, by the exploiting countries of the Western European type. The weaker countries of Latin America, knowing the advantages under which diplomatic protection has placed aliens, have in their municipal laws, constitutions and treaties emphasized the legal equality which exists as between national and alien.¹ Relying upon this presumably liberal doctrine of complete equality, the Latin-American states insist upon the application of the general principle that the alien is bound by the local law, and that the propriety of their conduct toward resident foreigners is to be tested by their municipal laws.

The Pan-American Conferences of 1889 and 1901 passed formal resolutions, which subsequently found their way into constitutions and statutes, to the effect that foreigners have the same civil rights as the citizens of the nation and that the Latin-American states have not, nor do they recognize in favor of foreigners, any other obligations and responsibilities than those which by their laws they have toward their own citizens.² The delegate of the United States to the first Pan-American Congress, Mr. Trescott, declined to subscribe to this resolution on the ground that it gave the alien "no right in protection of his interests other than such as the Government may have provided in the way of judicial trial or executive appeal to its own citizens and this principle once admitted, of course there follows the absolute exclusion of diplomatic reclamation."³

The United States has vigorously opposed the attempt of the Latin-American countries to pass upon the scope of their international duty. As was said by Secretary of State Bayard, in 1887:

"If a government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of inter-

Atty. Gen. 229, 235 (Cushing). Any discrimination against the alien, *e. g.*, a graver punishment than that inflicted upon nationals, prejudicial irregularity in judicial proceedings, violation of treaties or international law, constitutes a denial of justice and opens the right to diplomatic interposition.

¹ The attempts by local legislation to avoid diplomatic interposition will be discussed hereafter, *infra*, § 390 *et seq.*

² Alvarez in 3 A. J. I. L. (1909), 329, 333.

³ Report of the delegate in Sen. Ex. Doc. 224, 51st Cong. 1st sess., 28-29.

national law would be but the shadow of a name, and would afford no protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a Government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties."¹

The principle that equality of treatment between nationals and aliens releases a state from pecuniary responsibility for injury to aliens is conditioned upon the fact that its administration of justice satisfies the standard of civilized justice established by international law. Foreign states, however, undertake to judge for themselves as to the local state's compliance with international standards—a defect in the system which arbitration has done much to remedy.

The United States has never taken the position that one who acquires a residence in a foreign country does so at his peril and assumes the risk of ill-treatment or injury identically with citizens.² Where a state does not normally possess or is not disposed to employ sufficient power to prevent injury to the alien, the state's responsibility is considered as established; the delinquency may occur either in its legislative, executive, or judicial departments.³ One reason why the alien is not bound to submit to unjust treatment equally with nationals, against which the national has no judicial redress, is because the latter is presumed to have a political remedy, whereas the alien's inability to exercise political rights deprives him of one of the principal safeguards of the rights of the citizen. For this reason diplomatic inter-

¹ Mr. Bayard, Sec'y of State, to Mr. Connery, Nov. 1, 1887, For. Rel., 1887, pp. 751, 753. See also C. C. Hyde in Proceedings of the Amer. Soc. of Int. Law, 1911, p. 36.

² Mr. Bayard, Sec'y of State, to Mr. Buck, min. to Peru, Aug. 24, 1886, Moore's Dig. VI, 252, in case of U. S. citizen Young killed in Peru, in 1884, by a Peruvian soldier.

³ C. C. Hyde, in Proceedings, *supra*, 1911, p. 33. While this rule is frequently invoked by European governments against the states of Latin-America, a temporary lack of power to prevent lawless injury to aliens is not a good legal ground to invoke the responsibility of the state. This has been often asserted by the United States in mob violence cases (*infra*, § 91), though indemnities have generally been paid. In times of civil disturbance, the alien like the national should be compelled to bear the necessary and incidental consequences of such conditions. This has been asserted by the United States in times when civil guarantees were suspended, *e. g.*, during the Civil War. Only where the alien is discriminated against, by direct injury or unreasonable failure to prevent it, should the defense of civil disturbance be rejected.

position may be invoked by the alien for the enforcement of his rights.¹ The alien, therefore, is not bound to accept the treatment accorded to nationals if such treatment is in violation of the ordinary principles of civilized justice, and notwithstanding the fact that the national has no immediate remedy against the injustice.

§ 45. Treaty Rights of Aliens in the United States.

The inability of the United States to enforce the treaty rights of aliens in the states has often brought about diplomatic controversies between this country and foreign governments. The anomalous situation created by the fact that the states of the Union may legislate with reference to aliens has on several occasions threatened to disturb the friendly relations between our own and foreign governments, and the incompetence of the federal government under existing laws to compel state officials to recognize and enforce the treaty rights of aliens has had the attention of Presidents and of Congress at various times. That Congress has the power to legislate for the protection of aliens in their treaty rights, seems unquestionable.² Bills have been introduced and their passage urged to give the federal courts jurisdiction over cases involving an alleged violation of the treaty rights of aliens.³ On several occasions, the federal government has found it necessary to pay foreign claims for the violation by the states of an alien's treaty rights, largely because it has been found practically impossible, owing to local sentiment, successfully to prosecute the guilty offenders in the state courts.⁴ The peculiar situation created

¹ See brief of J. B. Moore in *Constancia Sugar Rfg. Co. v. U. S.*, No. 196, before Spanish Treaty Claims Commission. See also Pinheiro-Ferreira in Pradier-Fodéré, *op. cit.* I, § 405.

² *Baldwin v. Franks*, 120 U. S. 678, 682, 707.

³ S. Rep. 392, 56th Cong. 1st sess. Ex-senator Turner in Proceedings of the Amer. Soc. of Int. Law, v. 2 (1908), 21 *et seq.* and Robert Lansing, *ibid.* 44-60. The responsibility of the federal government for violations of the rights of aliens, by Nelson Gammans, 8 A. J. I. L. (1914), 73-80; Ex-president Taft in the Independent, Feb. 2, 1914, pp. 156-158; Feb. 9, 1914, pp. 204-208. Simeon E. Baldwin suggests that Congress should authorize the bringing of an action by the U. S. in a state court instead of in a federal court. 13 Mich. L. Rev. (1914) 17-20.

⁴ S. Rep. 392, 56th Cong. 1st sess. See also *Baldwin v. Franks*, 120 U. S. 678; S. Doc. 95, 55th Cong. 2nd sess., p. 2. See *infra*, p. 225.

by the urgent and solicitous appeal of a Secretary of State to a state legislature to avoid any legislation unfriendly to a foreign nation and the numerous examples of discriminatory legislation by the states against certain foreign interests, *e. g.*, insurance companies, Japanese farmers (in California), etc., reveals not only the practical helplessness of the federal government in dealing with many phases of our foreign relations but discloses an actual encroachment by the states upon the constitutionally unrestricted power of the national government and the express prohibition to the states of dealing with foreign relations.¹

Aliens in the United States who allege a violation of treaty rights are placed in a curious position by the constitutional rule that the determination of the rights of aliens claimed under treaty is within the jurisdiction of the judiciary. Inasmuch as a treaty is the supreme law of the land, an alien invoking a right under a treaty must plead it in the usual course of judicial proceedings,² and until justice has been denied him in those proceedings, the diplomatic interposition of his government is regarded as premature. Hence aliens, complaining to the Department of State through their governments of the violation of treaty rights, are referred to the courts, or if the case is already in the courts, the Executive declines to interfere on the ground of constitutional incompetence, and on the ground that a treaty merely confers substantive rights to be enforced in the appropriate courts. An act of state officials which is evidently a violation of treaty rights must often, therefore, await judicial determination before the Executive may properly interfere. If the decision of the court is against the alien, the Executive usually feels justified in rejecting any subsequent diplomatic claim which may be advanced in his behalf. Foreign governments, however, may with justice answer that no government can rightfully claim to be the final judge of its compliance with international obligations, or shield itself behind its municipal law or decisions to escape international liability. On the other hand, if the decision supports the alien's right under treaty, *e. g.*, if the alien has been wrongfully arrested or detained in violation of treaty by

¹ Willoughby, W. W., *Principles of the constitutional law of the U. S.*, New York, 1912 (abridged ed.), 154 *et seq.*

² Bradford, Atty. Gen., in 1 Op. Atty. Gen., July 26, 1794, 2nd ser., 24.

police authorities and is subsequently released by decision of a court, the Executive has taken the position that the restoration of the alien to his rights by regular judicial proceedings releases the government from legal liability. Equitable considerations, however, have been held in flagrant cases to warrant a recommendation to Congress for the payment of an indemnity as an act of grace.¹

POSITION IN WAR

§ 46. Aliens in War.

But brief mention can be made of some of the more important phases and general principles of the alien's position in time of war. During the nineteenth century the theory gained ground steadily that war is primarily a relation between states, and should so far as possible leave unaffected the rights of person and property of non-combatants. The theory has been confirmed in practice by treaties between states and by international conventions, such as those at The Hague. While in strict law, war makes enemies of the subjects of the respective belligerents and authorizes their expulsion from the belligerent territory, a network of treaties has established the practical rule that aliens, nationals of an enemy state, may continue to reside, provided they maintain a neutral position, similar to that of the nationals of neutral states. In the case of merchants, nationals of the enemy state, this permission to reside and trade is usually limited to six months or one year, while in the case of others who might be regarded as alien enemies and who are engaged in peaceful occupations, provision is usually made for the security of their persons and property and their unmolested residence. We may quote the customary provision of the treaties of the United States:

"If by any fatality, which cannot be expected, and which may God avert, the two contracting parties should be engaged in a war with each other, they have agreed and do agree, now for then, that there shall be allowed the term of six months to the merchants residing on the coasts and in the ports of each other, and the term of one year to those who dwell in the interior, to arrange their business, and transport their effects wherever they please, with the safe conduct necessary to protect

¹ Claim of 3 members of crew of Norwegian ship *Ingrid*, Oct. 8, 1914, H. Doc., 1172, 62nd Cong. 2nd sess.

them and their property, until they arrive at the ports designated for their embarkation. And all women and children, scholars of every faculty, cultivators of the earth, artisans, mechanics, manufacturers, and fishermen, unarmed and inhabiting the unfortified towns, villages, or places, and, in general, all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the belligerent in whose power, by the events of war, they may happen to fall; but, if it be necessary that anything should be taken from them for the use of such belligerent, the same shall be paid for at a reasonable price.¹

It is a general rule, rigorously enforced, that trading between enemies is prohibited during the war.² The principle enunciated by Bynkershoek: "*Ex natura belli commercia inter hostes cessare non est dubitandum*," has become firmly imbedded in the practice of nations, although a state may, for reasons of expediency, permit an exception by granting individuals a license to trade with the enemy. Property found violating the rule is liable to confiscation. The subject is extremely complicated and its difficulty is increased by the various criteria of enemy character applied to the ownership of the property engaged in the forbidden trade.³ This is equally true of most private property of enemies at sea, which is still, notwithstanding the vigorous objection of many nations, subject to capture by belligerents. The British and American rule of testing enemy character, for purposes of trading and maritime capture, by the trade domicile of the owner, differs fundamentally from the continental practice of determining

¹ Art. 21, treaty of Feb. 26, 1871, between the U. S. and Italy, Malloy, *Treaties*, etc., 1910, I, 975.

² Halleck, *International law*, London, 1908, II, ch. 23, p. 143 *et seq.*; Bentwich, N., *Law of private property in war*, London, 1907, p. 47. This rule applies in Anglo-American law only to persons resident in the respective belligerent states. See the *Mashona*, 2 n. s. Journ. of the Soc. of Comp. Leg. (1900) 326-341. See British Trading with the Enemy Act, 1914, 4 and 5 Geo. 5, ch. 87 and Proclamation No. 2, Sept. 9, 1914 and amendment Oct. 8, 1914. See also Schuster, E. J., *The effect of war and moratorium on commercial transactions*, 2nd ed., London, 1914, pp. 7-12 and appendix; Trotter, William F., *The law of contract during war*, London, 1914, Part I, § 9; Page, Arthur, *War and alien enemies*, London, 1914, 34 *et seq.*, and Scott, Leslie, *Trading with the enemy*, 2nd ed., London, 1914.

³ Halleck, *ibid.* II, 96 *et seq.*; Schuster, *op. cit.*, 7; Trotter, *op. cit.*, part I, § 10.

such character by the nationality of the owner.¹ The rules of the common law as modified by the British emergency legislation following the outbreak of the present European War constitute the following classes as alien enemies: every individual or partnership firm residing in or carrying on business in an enemy country, or corporation there incorporated; every subject of an enemy state carrying on a prohibited trade in British territory, and for the purpose of the patent, designs and trade-mark acts, any subject of the enemy wherever resident, and any British corporation controlled by or carried on for the benefit of enemy subjects.²

The prohibition of intercourse between enemies has important effects upon the legal relations of nationals of the enemy states.³ It applies particularly to contractual relations between alien enemies. All contracts entered into after the outbreak of war are void and incapable of enforcement at any time. Those concluded before the war are not void, but their enforcement is suspended until the conclusion of peace.⁴ The running of the statute of limitations is also suspended.⁵ Executory contracts which require fulfillment during the war are void.⁶ Existing commercial partnerships between nationals of enemy states are dissolved by the outbreak of war.⁷ Whether the same rule applies

¹ Bentwich, *op. cit.*, appendix, 142-147; Baty, Trade domicile in war, *Journ. of Soc. of Comp. leg.*, August, 1908, pp. 156-166 and a new edition, London, 1915; Westlake, Trade domicile in war, *ibid.*, April, 1909, pp. 265-268; Phillipson, Coleman, Effect of war on contracts, London, 1909, p. 33 (2nd ed., 1914).

² Schuster, *op. cit.*, 3-7, 45 *et seq.*; Page, *op. cit.*, Ch. I.

³ *Kershaw v. Kelsey*, 100 Mass. 561. See also A. D. McNair, Alien enemy litigants, 31 *Law Quar. Rev.* (1915), 154-169, and Schuster and Trotter, *op. cit.*

⁴ *Ex parte Boussmaker* (1806), 13 Vesey, 71; *Caperton v. Bowyer*, 14 Wall. 216; Phillipson, *op. cit.* 70, 72. Contractual relations permitted by the rules of war, are not, of course, affected. Latifi, A., Effects of war on property, London, 1909, p. 50 *et seq.*; Leslie Scott in 30 *Law Quar. Rev.* (1914) 77-90. As to the real effect of art. 23 (h) of the Hague Convention on Land War, see Dr. Karl Strupp in 23 *Ztschr. f. int. Recht*, 118-159; Hans Wehberg in 15 *R. D. I.* (n. s. 1913) 197-224; Schuster, *op. cit.* 14, 16, 41; Trotter, *op. cit.*, Part I, §§ 5, 8, 12.

⁵ *Hanger v. Abbott* (1867), 6 Wall. 532. The English opinion seems to be to the contrary, Phillipson, *op. cit.*, 75.

⁶ *Gamba v. Le Mesurier*, 4 East, 407; Schuster, *op. cit.*, 16; Trotter, *op. cit.*, Part I, § 12; Page, *op. cit.*, 39.

⁷ *Griswold v. Waddington*, 16 Johns. 438 (Kent); Hall, *op. cit.*, 384; Latifi, *op. cit.*,

to alien enemy stockholders in corporations appears more doubtful. According to one view, believed to be the better one, the stockholders' rights and obligations are suspended until the restoration of peace; according to another, these stockholders drop out and have a right to receive the value of their respective shares as on the day of the outbreak of the war.¹ The obligation of a state to pay its public debt is not affected by the war, even though its bonds are held by subjects of the enemy.²

Neutral aliens are left free to trade with other neutrals or with nationals of the enemy, subject to such restrictions as the acknowledged rights of the belligerents dictate. Within a certain degree municipal law imposes neutrality upon the citizens of neutral nations, and unneutral service may be punished both in municipal courts and by the belligerents. Beyond that, the restrictions imposed by belligerents upon neutral trade must be enforced by the belligerents themselves, and the danger of such punishment, usually confiscation, is the only penalty incurred by the neutral trader. By international law these restrictions upon the freedom of neutral trade are confined to the carriage of contraband, the violation of blockade, certain services rendered to the enemy and the constant liability to belligerent visit and search.³ With a view to curtailing the promiscuous capture of enemy property at sea, the Declaration of Paris of 1856 prescribed the rule, which has since been generally adopted, that the neutral flag covers enemy goods with the exception of contraband of war, and that neutral non-contraband goods are not liable to capture under the enemy flag.

The property of the citizens of an enemy state found within a belligerent's own territory may in strict law be confiscated.⁴ Modern

52; *Ztschr. f. Völkerr.*, 1909, p. 52; Schuster (*op. cit.*, 20-24), argues convincingly that the rule is of exceedingly narrow application, and has been misinterpreted.

¹ Phillipson, *op. cit.*, 91-95, 96-99; Westlake, 2nd ed. II, 53-55; Foreign investments in time of war, by R. A. Chadwick, 20 *Law Quar. Rev.* (1904), 167-185, especially p. 174; Latifi, *op. cit.*, 54 *et seq.*; Schuster, *op. cit.*, 24-27.

² J. B. Moore in 1 *Columbia L. Rev.* 209 *et seq.* and authorities there cited; Trotter, *op. cit.*, Part I, § 15.

³ Bentwich, *op. cit.*, 108.

⁴ *Brown v. U. S.*, 8 Cranch, 110; Kent's *Comm.* I, 1, 13; Page, *op. cit.*, 14 *et seq.*

practice, however, has practically abrogated this rule and substituted the more humane principle that such property is inviolable. Treaties have confirmed this practice. Most of the treaties of the United States with foreign powers provide not only for exemption from military service or contributions in lieu of such service, but also for exemption from forced loans or military exactions or contributions. Where the property of enemy individuals appears likely to be of service to the enemy in his military operations, as ships in certain cases, arms and ammunition, it may be sequestered to prevent its reaching him and be restored at the end of the war,¹ and it is always subject to eminent domain on payment of compensation. Inasmuch as alien enemies may be expelled, less rigorous measures, *e. g.*, concentration, prohibition of residence in certain defined areas, registration, and temporary detention, especially when there is danger of their serving the enemy, appear to be justified. Various measures of supervision over alien enemies have been resorted to by the belligerents in the present European war.²

The person and property of neutrals are in principle subject to such exceptional measures of jurisdiction and to such exceptional taxation and seizure for the use of the state as the existence of hostilities may render necessary, provided that no greater burden is imposed upon aliens than upon nationals.³

The property of citizens of the enemy state on hostile territory, *i. e.*, in territory in which one of the belligerents becomes and exercises the rights of a military occupant, is, strictly speaking, inviolable. This

¹ Latifi, A., *op. cit.*, 40. The French decree of Sept. 27, 1914 forbidding Germans and Austrians to engage in "any commercial transaction in France" seems legitimate. But the forcible liquidation of all German and Austrian concerns, and the sequestration and retention of all moneys received in the liquidation, for the benefit of French creditors or as security for a possible future indemnity to be exacted, seems an unwarranted extension of belligerent rights. As to the position of foreign commercial enterprises in Germany during the war see Bundesratsordnung of Sept. 4, 1914 and Dr. Waldecker in 19 Deutsche Juristen-Ztg., Oct. 1, 1914, 1160-1164.

² See, *e. g.*, The British Aliens Restriction Act, 1914, and Orders in Council Aug. 5 and 12, 1914; Page, *op. cit.*, 11-12 and appendices.

³ This would include the right of angary by which foreign or national vessels may be seized in the ports of the state and compelled to transport soldiers or render other military service. Phillimore, *op. cit.*, III, 50; Hall, *op. cit.*, 737.

rule has been confirmed by the Hague Regulations of 1899.¹ It is, however, subject to certain modifications: (a) Certain kinds of property are considered lawful booty, *e. g.*, arms, horses, and military papers seized from combatants on the field of battle; (b) objects useful in military operations, such as conveyances and war material of all kinds may be taken and used, but must be restored and compensation paid for their use;² (c) requisitions of food, money, goods and services are justified by the necessities of war, and then only. They must be paid for or receipts given to be redeemed later;³ (d) contributions or payments over and above the usual taxes may be levied on all the inhabitants. The method of levying them is provided by the Hague Regulations.⁴ Such a wide discretion, however, is vested in the military commander as to the purposes for which they may be levied and as to their amount, that the restrictions imposed by the general rule and its strictly limited exceptions, are greatly weakened.⁵ The property of neutral subjects in hostile territory is liable to the same burdens as that of subjects of the enemy.⁶ The proposals of Germany and the United States at The Hague to grant neutral property greater privileges were defeated by the combined opposition of several of the other great powers.

The private property of alien enemies at sea is subject to capture, unless, where cargo, it is protected by a neutral flag; whereas the property of neutrals, ship or cargo, is exempt from capture, unless contraband.⁷ The first of these general rules has resisted the vigorous agitation of several countries, led by the United States, to secure immunity for the private property of enemies at sea, not contraband of war, although several states, by treaty, have agreed to abide by this more enlightened practice. The general rule above mentioned is

¹ Latifi, *op. cit.*, 29 *et seq.*

² Hague Regulations, art. 53.

³ Hague Regulations, art. 52; Spaight, J. M., *War rights on land*, London, 1911, p. 381; Pont, Ch., *Les réquisitions militaires*, Nancy, 1905.

⁴ Hague Regulations, arts. 49, 51.

⁵ Cases are enumerated in Latifi, *op. cit.*, 32 *et seq.*

⁶ Westlake, *op. cit.* II, 284 *et seq.*; Frankenbach, C., *Die Rechtsstellung von neutralen Staatsangehörigen in kriegsführenden Staaten*, Marburg, 1910.

⁷ Bentwich, *op. cit.*, 108 *et seq.* 132; Latifi, *op. cit.*, 74 *et seq.*

exceedingly difficult of application, owing to the difficulty in determining the enemy or neutral character of vessel or cargo. The flag is generally a *prima facie* test as to neutral property, but not as to enemy property. On the continent the enemy or neutral character of cargo is determined by the nationality of its owner, whereas in Great Britain and the United States this is determined by his commercial domicile. The question is further complicated by uncertainty as to who is the owner, consignor or consignee, by doubt in certain cases where ownership is transferred while goods are *in transitu*—though doubts are generally construed against the transferee¹—by the origin of certain kinds of produce, whether from neutral or from enemy soil (being enemy property in the latter case, though owned by a neutral), and innumerable other problems to which the question has given rise.² Certain kinds of property, however, are exempt from maritime capture. By Convention VI of the Hague Conference of 1907 merchant vessels of the enemy in the ports of a belligerent are allowed a reasonable time to discharge and leave.³ Exemption from confiscation is likewise extended to vessels which left their last port before the commencement of the war and are found on the high seas still ignorant of its existence. Where detention is necessary they must be restored after the war, or where requisitioned, compensation must be made. This rule extends also to enemy cargo under the above circumstances. The rule that enemy vessels with their enemy cargo may be captured, is also subject to exception in the following cases: (a) vessels engaged in religious, scientific and philanthropic missions; (b) cartel ships carrying exchanged prisoners; (c) hospital ships; (d) personal effects of passengers and crew; (e) fishing vessels; (f) postal correspondence and, as between some nations, mail steamers; and (g) submarine cables.⁴

¹ The *Vrouw Margaretha*, 1 C. Rob. 336.

² Halleck, *op. cit.* II, ch. 22, p. 96 *et seq.*; Wehberg, Hans, *Capture in war on land and sea*, London, 1911.

³ Page, *op. cit.*, 16–19; J. B. Scott in 2 A. J. I. L. (1908), 261; Oppenheim in 8 *Ztschr. f. Völkerrecht* (1914), 154 *et seq.*; Baty in 26 *Jurid. Rev.* (1914), 256. *Supra*, p. 62 note 2.

⁴ Latifi, *op. cit.*, 103 *et seq.*

CHAPTER III

MUNICIPAL RESPONSIBILITY OF THE STATE

§ 47. Outline of the Subject.

An international claim, with its demand for diplomatic protection, is founded upon some violation of the right of person or property of an alien. In first instance, this right and the remedy for its infringement are measured largely by the municipal law of the state of residence. For this reason it is of importance as a foundation for a closer study of the international responsibility of the state to examine along broad lines the extent to which the state grants municipal remedies to an individual injured by an official or governmental act. This is necessary not only because municipal responsibility is often the measure of international responsibility and because injured aliens are so frequently remitted to their local remedies when calling upon the protection of their own government, but because, as will be seen, the responsibility fixed upon governments toward aliens by international tribunals and in the diplomatic adjustment of cases of protection deviates in many respects from the principles laid down by national judicial and administrative tribunals for the determination of municipal liability.

A detailed study of the remedies of the individual in municipal law against acts of the administration, requires more space than is at our command for the present purpose, namely, to lay a foundation for the international responsibility of the state. The discussion, therefore, will be confined to a comparative treatment of various phases of the municipal responsibility of the state—on the one hand, remedies available to the individual through judicial control over the administration, particularly recourse for the annulment or prevention of unlawful acts of officials; and on the other hand, remedies in the form of actions for damages, against the state or against officers, for the

injuries sustained by individuals through governmental acts. In the course of the discussion, the legal system prevailing in France, Germany, Great Britain and the United States will be primarily drawn upon for purposes of comparison.

§ 48. Distinction between Governmental and Corporate Functions.

Attention may first be directed to certain broad distinctions made in the administrative law of the civil law countries and manifested as well (although unconsciously, except in the case of municipal corporations) in the Anglo-American system. This is a division of the activity of the state into two separate aspects, the one governmental, or what Europeans call the state as a public power (*puissance publique*, *öffentliche Gewalt*), the other proprietary, or the state as a civil person. In its capacity as a governmental power or as a sovereign, *jure imperii*, the state is in principle immune from liability for its acts causing injury to private individuals. In a broad way this activity involves those functions which look to the external and internal security of the state—through army, navy, police, etc. By statute, as will be seen, this sphere of immunity is being gradually narrowed. On the other hand, the state, as a corporation, enters into legal relations with individuals and even engages in various enterprises, *jure gestionis*. In Europe such activity is even greater than in the United States. It involves such services as the operation of a railroad system, the carrying on of industrial monopolies, *e. g.*, the manufacture of matches and tobacco products, and the ownership of land, buildings and other property. The state in these activities is considered as a private person, subject to the same liabilities and generally to the same principles of law as are applied to the individual. In Germany, the state viewed from this proprietary aspect is called the *fiskus*; in France these activities are known as *actes de gestion*. In the United States and Great Britain the admission of contractual liability is a manifestation of the distinction. While the federal government and the commonwealths of the United States have in no other way given expression to the distinction of governmental and private or corporate activities of the state, the distinction is clearly recognized in the law of our cities and other municipal corporations.

§ 49. Judicial Control over Acts of Administration.

Systems of judicial control over acts of the administration differ very much from country to country. Laferrière divides the important countries into three separate groups:¹ First, the group adopting the French system, which is characterized by the principle of the separation of powers with separate administrative tribunals having jurisdiction of litigation between the administration and individuals, and a tribunal of conflicts to determine what are acts of administration. This system in general has been adopted by Spain, Portugal, Italy, the German Empire and many of the important German states, Austria-Hungary, and some of the cantons of Switzerland. The second group is characterized by the absence of administrative tribunals, the administrative function nevertheless remaining distinct and separate from the judicial. The ordinary judicial tribunals pass upon all claims having a contentious character, but they cannot interfere in the powers of the administration or annul its acts. The independence of the administrative function from the courts may be asserted by raising the conflict, jurisdiction of which matter resides in one of the higher judicial courts. This system is followed by Belgium, Sweden, Norway, Denmark, Greece, the majority of the Swiss cantons and some of the smaller German states. With various modifications it has been adopted by several of the states of Latin-America. The third group includes Great Britain and the United States. Here the judicial tribunals have full jurisdiction between the administration and individuals, and by means of the extraordinary legal remedies, particularly injunction, mandamus and certiorari, have the power to delimit the sphere of administrative competence and exercise a powerful control over administrative acts. The system is characterized by a decentralized administration, its elective nature, and the absence of an administrative hierarchy, so that the powers exercised in a large part of Europe by superior administrative authorities are in the Anglo-American system exercised by the judicial authorities.² The law of

¹ Laferrière, E., *Traité de la juridiction administrative et des recours contentieux*, 2nd ed., Paris, 1896, I, p. 26 *et seq.* Cf. Goodnow, F. J., *Comparative administrative law*, New York, 1893, II, 144 *et seq.*, for Great Britain, the United States, France and Germany.

² For general works on the administrative systems of the more important coun-

France, Germany and of other countries having an administrative jurisdiction protects the administration from interference by the courts to an extent unknown to the Anglo-American law.¹

tries, the following may be consulted. Only some of them have been actually used in the course of the present study:

France: Aucoc, L., *Conférences sur l'administration et le droit administratif*, 3rd ed., Paris, 1885-86, 2 v.; Béquet, Léon, *Répertoire du droit administratif*, Paris, 1882-1907, 24 vol., especially v. 23, title "Responsabilité" by Teissier; Berthélemy, J. B. H., *Traité élémentaire de droit administratif*, 5. éd., Paris, 1908; Block, Maurice, *Dictionnaire de l'administration française*, . . . 5. éd., Paris, 1905; 2 vol. *Same*, *Supplément*, Paris, 1907; Boeuf, Henri, *Résumé de droit administratif*, 20. éd., Paris, 1907; Brémont, Jules, *Traité théorique et pratique de la compétence administrative*, Paris, 1894; Dareste de La Chavanne, Rodolphe, *La justice administrative en France*, . . . 2. éd., Paris, 1898; Ducrocq, Th., *Cours de droit administratif*, . . . 7. éd., Paris, 1897-1905, 7 vol.; Hauriou, Maurice, *Précis de droit administratif et de droit public*, 8th éd., Paris, 1914; Jacquelin, René L. D., *Les principes dominants du contentieux administratif*, . . . Paris, 1899; Jèze, Gaston, *Eléments du droit public et administratif*, . . . Paris, 1910; Laferrière, E., *Traité de la juridiction administrative et des recours contentieux*, . . . 2. éd., Paris, 1896, 2 vol.; Mailhol, Dayre de, *Dictionnaire encyclopédique d'administration générale*, Paris, 1906-8, 5 vol.; Marie, Jean, *Eléments de droit administratif*, . . . Paris, 1890; Mayer, Otto, *Theorie des französischen Verwaltungsrechts*, Strassburg, 1886; Moreau, Félix P. L., *Manuel de droit administratif*, . . . Paris, 1909.

Germany and Prussia: Altmann, Paul, *Die Verfassung und Verwaltung im Deutschen Reiche und Preussen*, . . . Berlin, 1907-08, 2 vol.; Bornhak, Konrad, *Grundriss des Verwaltungsrechts in Preussen und dem Deutschen Reiche*, 4th ed., Leipzig, 1912; Fleiner, F., *Institutionen des deutschen Verwaltungsrechts*, 3rd ed., Tübingen, 1913; Gneist, R., *Der Rechtsstaat u Verwaltungsgerichte in Deutschland*, 2. aufl., Berlin, 1879; *Jahrbuch des Verwaltungsrechts*, Berlin, 1907-1914, vol. 1-8 (1905-1914), and continuation; Kunze, Fritz, *Das Verwaltungsstreitverfahren*, . . . Berlin, 1908; Loening, Edgar, *Lehrbuch des deutschen Verwaltungsrechts*, Leipzig, 1884; Mayer, Otto, *Deutsches Verwaltungsrecht*, Leipzig, 1895-6 (also in French, Paris, 1903-06), 2 vol., 2nd ed., 1914; Meyer, Georg, *Lehrbuch des deutschen Verwaltungsrechtes*, . . . 3. aufl., Leipzig, 1910; Mohl, Robert v., *Die Polizei-wissenschaft nach den Grundsätzen des Rechtsstaates*, . . . 3. aufl., Tübingen, 1866, 3 vol.; Sarwey, O., *Allgemeines Verwaltungsrecht*, Freiburg, 1884; Sarwey, O., *Das öffentliche Recht u. die Verwaltungsrechtspflege*, Tübingen, 1880; Stengel, Karl M. J. L., *Lehrbuch des deutschen Verwaltungsrechts*, Stuttgart, 1886; Stengel, Karl M. J. L., *Wörterbuch des deutschen Verwaltungsrechts*, . . . 2. aufl., by Fleischmann, Tübingen, 1911-1914, 3 v.; Tezner, Friedrich, *Die deutschen Theorien der Verwaltungsrechtspflege*, . . . Berlin, 1901; Zorn, Philipp, *Das Staatsrecht des Deutschen Reiches*, 2. aufl., Berlin, 1895-97, 2 vols. (Vol. 1: *Das Verfassungsrecht*; Vol. 2: *Das Verwaltungsrecht*. . .)

¹ Cf. article by Ernst Freund, *Private claims against the state*, 8 Pol. Sc. Quar. (1893), 625, 651.

§ 50. When State is Responsible, and Incidence of Liability.

It is now recognized in all civilized countries that the interference of the state in private rights for public purposes requires in some measure a compensation for the special sacrifice borne by the in-

Bornhak, Konrad, *Geschichte des preussischen Verwaltungsrechts*, Berlin, 1884-86, 3 vol.; *Handbuch für preussische Verwaltungsbeamte . . . begründet von Illing . . . fortgeführt von George Kautz, . . . 10 aufl.*, Berlin, 1913, 3 vol. and index; *Handwörterbuch der preussischen Verwaltung*, Hrsg. v. Bitter, 2 aufl., Leipzig, 1911, 2 vols.; *Preussen, Oberverwaltungsgericht, Die Rechtsgrundsätze des Königlich Preussischen Oberverwaltungsgerichts*, Begründet von K. Parey, 4 aufl., Hrsg. von Fr. Kunze . . . und Dr. G. Kautz, . . . Berlin, J. Guttentag, 1905-06, 3 v. and supplement.

Austria-Hungary: Excel, Theodor, *Das Verfahren vor dem K. K. Verwaltungsgerichtshofe . . . Wien, 1885-92*, 2 vols.; Grünwald, Ludwig, *Der österreichische Verwaltungsgerichtshof, Mit Vergleichung des bestehenden Rechtes in England, Frankreich, Italien, Baden und Pruessen*, Wien, 1875; Gumplowicz, Ludwig, *Das österreichische Staatsrecht (Verfassungs- und Verwaltungsrecht) . . . 2 aufl.*, Wien, 1902; Kissling, Karl von, *Beiträge zur Theorie des Verwaltungsrechtes*. Wien, 1876; Kissling, Karl von, *Reichsgericht und Verwaltungsgerichtshof . . . Wien, 1875*; Mayrhofer, Ernst, . . . *Handbuch für den politischen Verwaltungsdienst, . . . 5. aufl.* Wien, 1895-1901, 7 vol. *Same*, Index, Wien, 1903. *Same*, Supp., 1909-; Mischler, Ernst, *Österreichisches Staatswörterbuch, . . . 2 aufl.*, Wien, 1905-9, 4 vols.; *Normaliensammlung für den politischen Verwaltungsdienst . . . Wien, 1901-1907*, 4 vol. *Same*, 3 Supplements. Wien, 1911-12; Tezner, Friedrich, *Handbuch des österreichischen Administrativverfahrens, . . . Wien, 1896*; Ulbrich, Josef, *Handbuch der österreichischen politischen Verwaltung, . . . Wien, 1888-90*, 2 vol. *Same*, Supplement. Wien, 1892; Ulbrich, Josef, *Lehrbuch des österreichischen Verwaltungsrechtes, . . . Wien, 1904*; Zolger, Ivan, *Oesterreichisches Verordnungsrecht, verwaltungsrechtlich dargestellt, . . . Innsbruck, 1898*; Markus, Desider, *Ungarisches Verwaltungsrecht*, Tübingen, 1912.

Italy: Boccardo, Gerolamo, *Manuale di diritto amministrativo, . . . 2. ed.*, Torino-Napoli, 1886; Brunialti, A., *Il diritto amministrativo italiano e comparato nella scienza e nella istituzioni*, Torino, 1912-, Vol. 1 and continuation; Brunialti, A., *I diritti dei cittadini e la giustizia amministrativa in Italia*, Torino, 1902; *Enciclopedia di amministrazione, industria e commercio . . . Opera diretta dal Comm. Giuseppe Cerboni . . . Milano, F. Vallardi, 1891-1904*, 5 vols.; Forti, Ugo, . . . *Studi e questioni di diritto amministrativo, . . . Torino, 1906*; Orlando, V. E., *Primo trattato completo di diritto amministrativo italiano, . . . Milano, 1900-05*, vols. 1, 3, 4², 4³, 9 (in progress); Presutti, Enrico, . . . *Istituzioni di diritto amministrativo italiano, . . . Napoli, 1904-05*, 2 vol.; Raneletti, *Diritto amministrativo*, Naples, 1912-, Vol. 1 and cont.; Salandra, A., *Lezioni di diritto amministrativo per cura di C. Manes*, Rome, 1912; Vitta, Cino, . . . *Giustizia amministrativa. Principi fondamentali, . . . Milano, 1903*.

Spain: Abella, Fermín, *Tratado de derecho administrativo español, . . . Madrid, 1886-88*, 3 vol.; Aleu y Carrera, Manuel, *Diccionario de la administración municipal*

dividual in the public interest. The dividing line between sacrifices for which the individual shall be compensated and those which he must bear alone, the extent of his remedy for official misfeasance or nonfeasance, the proper party defendant, whether state or officer,

de España, . . . 2. ed., Madrid, 1908-11, 8 vol.; Caballero y Montes, José María, Lo contencioso-administrativo, . . . Zaragoza, 1902-04, 3 vol.; Colmerio, Manuel, Elementos del derecho político y administrativo de España, . . . 7. ed., Madrid, 1887; González, Alfonso, La materia contencioso-administrativa, comentario á la legislación vigente, Madrid, 1903; Martínez Aleubilla, Marcelo, Diccionario de la administración española, . . . 5. ed., . . . Madrid, . . . 1892-95, 9 vols. and Appendices; Posada, Adolfo, Tratado de derecho administrativo según las teorías, filosóficas y la legislación positiva, . . . Madrid, 1897-98, 2 vols.; Royo Villanova, Antonio, Elementos de derecho administrativo, . . . Valladolid, 1907, 2 vol. in 1; Santamaría de Paredes, Vicente, Curso de derecho administrativo, . . . 7. ed., Madrid, 1911; Ubierna y Eusa, J. A., Conflictos jurisdiccionales entre los poderes ejecutivo y judicial, Madrid, 1911.

Belgium: Bladel, Georges, Eléments de droit maritime administratif belge, Bruxelles, 1912; Bourquin, Maurice, La protection des droits individuels contre les abus de pouvoir de l'autorité administrative en Belgique, Bruxelles, 1912; Errera, Paul, Traité de droit public belge, Paris, 1909; Giron, A., Dictionnaire de droit administratif et de droit public, Bruxelles, 1895-96, 3 vol.; Giron, A., Le droit administratif de la Belgique, 2. éd., . . . Bruxelles, 1885, 3 vol.; Masson, F., and Wiliquet, C., Manuel de droit constitutionnel, notions élémentaires des institutions constitutionnelles et administratives de la Belgique, . . . 7. éd., Bruxelles, 1904; Orban, O., Manuel de droit administratif belge, . . . Liège, Namur, 1897.

Portugal: Motta, Jayme Arthur da, Código administrativo de 1896 anotado, 2. edição, Coimbra, 1909; Pedrosa, Guimaraes, Curso de ciencia da administração e direito administrativo, 2. edição, Coimbra, Imp. Univ., 1909, 2 vol.

SPANISH AMERICA:

Argentina: Estrada, José M., Curso de derecho constitucional, federal y administrativo, Buenos Aires, 1895; López, Lucio Vicente, Derecho administrativo argentino, . . . Buenos Aires, 1902.

Bolivia: Loayza, Hiram, Juicios de hacienda comprende juicio coactivo, . . . La Paz, 1906; Moscoso, Octavio, Diccionario jurídico y administrativo de Bolivia, Sucre, 1908, 2 vol.; Santos Quinteros, José, Derecho administrativo, Sucre, 1893.

Brazil: Viveiros de Castro, August O., Tratado de sciencia da administração e direito administrativo, 2. ed., Rio de Janeiro, 1912.

Chile: Amunategui Rivera, J. D., Administración política i derecho administrativo, Santiago de Chile, 1907; Amunategui Rivera, José Domingo, Tratado general de derecho administrativo aplicado á la legislación de Chile, Santiago, 1907; Amunategui Rivera, J. D., Resumen de derecho administrativo aplicado a la legislación de Chile, Montevideo, 1900; Larrain Zanartu, J. J., El ciudadano y el gobierno, Santiago, 1886; Perez de Arce, Hermógenes. Tratado de administración pública, . . . Santiago, 1896.

Colombia: Olarte Camacho, Vicente, Recopilación de leyes y disposiciones ad-

are matters which differ from country to country and which require detailed examination.

We have already adverted to the two aspects of the state as a property owner and fiscal entrepreneur and as a public power. The difficulty in applying the rule of responsibility, which is generally admitted in the former case and on principle denied in the latter, consists in determining when the state does act as a subject of property rights and when it acts in its sovereign sphere as a public power. For example, one transaction may involve its functions in both capacities; thus, it has been held in France that a request for diplomatic interposition made upon the Foreign Office, with papers in support, cannot in case of refusal involve the responsibility of the state, but that the loss of the papers filed does warrant an action for damages. The only way of settling the difficulty is by reference to the administrative jurisprudence of the various countries, from which we may determine the particular activities of the state which have been held to be within its functions as a *fiskus*, or to constitute acts of *gestion*, and therefore to involve the liability of the state.

When the state acts in its capacity as a public power, its responsibility has often been admitted by special legislation. For example, all states recognize the necessity of compensating the owner of private property taken for public use. How much further governments go in

administrativas, Bogota, Colombia, 1901-2, 2 vol.; González, Florentino, *Derecho administrativo* (Bogota).

Costa Rica: Zambrana, Antonio, *La administración*. Un estudio, San José, 1897.

Cuba: Morilla, José Maria, *Breve tratado de derecho administrativo español general del reino, y especial de la isla de Cuba*, 2. ed., Habana, 1896, 2 vol. in 1.

Guatemala: González Saravia, Antonio, *La administración pública* (Guatemala).

Haiti: Price, Hannibal, *Législation haitienne. Cours de droit administratif*, . . . 2. ed., Havre, 1910.

Paraguay: *Ley de organización administrativa* (Asunción), 1908.

Peru: Ríos, Ricardo R., *Legislación administrativa y manual de funcionarios públicos*, Lima, Moreno, 1907-, Vol. 1 and cont.

Salvador: *Organización política y administración de el Salvador*. Codificación de las leyes políticas y administrativas vigentes (El Salvador).

Uruguay: Varela, Luis Vicente, *Código de procedimientos administrativos y de los contencioso administrativo*, Montevideo, 1908; Varela, Luis, *Apuntes de derecho administrativo*, . . . Montevideo, 1897, 2 vol.; Varela, Luis Vicente, *Estudios de derecho administrativo*, . . . Montevideo, 1901-6, 2 vol.

compensating individuals for losses incidental to the operation of the state's public or police power differs greatly from country to country. To some extent the question will be discussed below. For the present it may merely be noted that the more important countries of Europe are greatly widening the sphere of state responsibility for the losses imposed upon individuals through the exercise of the public power and especially is this the case where, in countries like France, an administrative jurisdiction controls acts of administration. Many publicists therefore profess to note an abandonment of the time-honored distinction between acts of *gestion* and acts of public power as a criterion of state responsibility, and it is unquestionably true that recent decisions have greatly weakened the force of the distinction.¹

Finally, in addition to the differences as to substantive responsibility, there is to be noted a wide variation in the remedies offered to individuals injured through official action. In some countries, as in France and Italy, recourse may be had to the administrative courts by way of annulment for acts in excess of jurisdiction or power, or misuse of authority by officers. This remedy does not lie in Belgium and some other states, like the Scandinavian countries, where there are no administrative courts and where judicial control is extremely limited. In the United States and Great Britain, the judicial control through the use of injunction and mandamus effects the same purpose.² In some countries the government is made primarily responsible for the defective operation of the public administration, at least for acts not attributable to the personal malice or intentional wrong-doing of the officer. This is the system in force with various modifications in the countries of Western Europe. In France, the responsibility of the state is exceedingly wide, in Austria very narrow. In Germany, distinctions are made between the lawful and unlawful exercise of the public power, a special statute being a necessary con-

¹ Teissier, G., *La responsabilité de la puissance publique*, Paris, 1906; Sourdois, Jean, *De l'évolution, du fondement et de l'étendue de la responsabilité de l'Etat*, Bordeaux, 1908, ch. V. Tirard, Paul, *De la responsabilité de la puissance publique*, Paris, 1906, p. 171 *et seq.*, gives an account of the recent decisions of the French Conseil d'Etat which indicate the new tendency to widen the sphere of state responsibility. See also Otto Gierke in 28 *Deutscher Juristentag*, I, 102 *et seq.*

² Laferrière, *op. cit.*, I, 26 *et seq.*

dition for responsibility in the former case. Since the Prussian act of August 1, 1909, and the imperial act of May 22, 1910, the state by law has assumed responsibility for the unlawful acts of officers. Something of the same development may be noted in recent statutes of Salvador and Venezuela. In Switzerland and Hungary, the responsibility of the state is largely subsidiary to that of the offending officer.¹ In some countries, as in Austria, Portugal, Greece, Servia, and many of the countries of Latin-America, the responsibility of the wrong-doing officer is increased in direct ratio to the decrease in the responsibility of the state.² In the United States and Great Britain

¹ Über die Entschädigung für Einwirkungen der öffentlichen Gewalt in die Privatrechtsphäre by Walther Perlmann in 34 Ztschr. f. d. privat- u. öff. Recht, 57-122 and Studien zur Frage der Schadenshaftung des Staates und ihrer Geltendmachung, by Perlmann in 24 Archiv. f. öff. Recht (1909), 520-571; Die direkte oder subsidiäre Haftung des Staates und der Gemeinden für Versehen u. Vergehen ihrer Beamten und Angestellten by E. Ziegler in 7 (n. f.) Ztschr. f. Schweiz. Recht (1888), 481-562.

² La responsabilità dei pubblici funzionarii by G. Quaranta, 16 Il Filangieri, 273-297.

Portugal, constitution of April 29, 1826, art. 145, § 27.

Austria, Perlmann, *op. cit.*, p. 109. See, however, Ružicka, Ernst, Die Entschädigungsklage wegen übler obigkeitlicher Verwaltung, Wien, 1913, in which the author, on the basis of the decree of Feb. 13, 1789, finds a wide range of state responsibility to individuals, and almost no liability of the officer.

Brazil, Constitution of 1889, art. 60; Mexico, constitution of 1857, arts. 103, 104. In other countries of Latin-America, the liability of officers is limited to certain circumstances, *e. g.*, injuries inflicted in the course of revolutions.

Venezuela, Constitution of April 27, 1904, Title IV, art. 27; Title VIII, art. 115 (Rodriguez, Amer. Const. I, 205, 229); decree of Feb. 14, 1873, art. 3. By decree of Nov. 13, 1912, the state reserves a right of subrogation against the officer, if it must pay a diplomatic claim.

Salvador, Legislative decree of May 10, 1910, grants individuals a right to sue the state. See Exposición de motivos, by Salvador Rodríguez. Libro rosado.

Haiti, Constitution of Oct. 9, 1889, art. 185 (Rodríguez, II, 85).

Ecuador, Constitution, art. 39 (Rodriguez, II, 284); Salvador, Constitution, art. 138 (Rodriguez, I, 294); Bolivia, Constitution, art. 111 (Rodriguez, II, 441); see also Tchernoff, Protection des nationaux, 292; Calvo, *op. cit.*, § 1263.

As in most state systems founded upon Roman law, the state in Latin-America generally can be sued. It is expressly provided for in the following constitutions and laws:

Argentine constitution, Art. 100, Rodriguez, Vol. I, pp. 127-8; Brazil constitution, Art. 60, *ibid.*, Vol. I, p. 155; Colombia constitution, Art. 151, *ibid.*, Vol. II, p. 355; Costa Rica constitution, Art. 46, *ibid.*, Vol. I, p. 332; Venezuela constitution, Art. 14, *ibid.*, Vol. I, p. 225; Brazil, law of November 20, 1894, Collecção das Leis, 1894,

the responsibility of the state outside of contractual relations is exceedingly limited. By statute certain invasions of property rights in the public interest are compensated—thus, by state law, the duty to make compensation is at times imposed upon the state for the destruction of diseased animals; or of houses, to prevent the spread of a conflagration; for the injuries to individuals arising out of erroneous decisions of health officers in imposing restrictions upon persons suspected of contagious diseases, etc. On the other hand, the responsibility of officers is, in theory at least, exceedingly broad. We shall examine hereafter the many limitations on this supposedly wide responsibility. One tendency with respect to official responsibility is manifest on all sides—that is, in the interests of good administration, to protect the officer from liability for his acts performed in good faith. This tendency is compensated in Europe by increasing the responsibility of the state; in Anglo-American law, however, such a compensatory tendency is, as yet, hardly evident.

THE STATE AS A PUBLIC POWER

The study of the remedies of the individual and the respective responsibilities of state and officer can perhaps be made most clear by examining the state in its threefold functions as a public power, namely, the legislative, the judicial, and the executive or administrative—the last, for our purposes, the most important of all.

§ 51. Acts of Legislation—No Responsibility the Rule.

It is manifest that acts of legislation may seriously interfere with private interests and in some cases even private rights. An act of the legislature is almost always general and impersonal in its nature and can only in exceptional circumstances involve the state in pecun-

Vol. I, p. 16 *et seq.*; Colombia, law of August 31, 1886, Arts. 1, 2, 77 State Papers, p. 807; Venezuela, law of April 16, 1903, Art. 16, 96 State Papers, p. 647 *et seq.*; Decree of Nov. 13, 1912, 9 Bl. f. vergl. Rechtsw. (1913), Col. 71-74; Guatemala, law of February 21, 1894, Art. 81, 86 State Papers, p. 1286 *et seq.*; Salvador, Decree of May 10, 1910, Libro rosado. The state is practically always suable for its acts as a fiskus.

The supreme court is usually given jurisdiction of suits in which the government is a party.

itary liability. For example, the establishment of a state industrial monopoly, as in the case of the recent Italian law of April 4, 1912 and the Uruguayan law of 1912, establishing a state insurance monopoly, seriously interferes with private interests. Yet, in the absence of a special legislative provision granting an indemnity to private interests thus prejudiced, there is no municipal liability of the state.¹ France in 1835 established a tobacco monopoly and on other occasions by an act of legislation interfered similarly with the enjoyment of private rights without paying compensation.² On the other hand, in 1872, when France by legislation established a match monopoly, and when on March 29, 1903, Italy undertook the municipal ownership of certain public services a statutory indemnity was provided for the corporations and individuals thereby injured.³ In France, in which coun-

¹ Gaston, Jèze, *De la responsabilité pécuniaire de l'Etat italien envers les nationaux et les étrangers, à raison de l'établissement d'un monopole public des assurances sur la vie*, 29 *Rev. Dr. Pub.* (1912), 433-452. See also on the Uruguayan statute, article by same author, 30 *Rev. Dr. Pub.* (1913), 58 *et seq.* On the Italian law see the exhaustive opinion (Consultation) by E. Clunet, with opinions of many prominent jurists, rendered in behalf of the insurance companies, Paris, Jan. 28, 1912 (51 p.) to the effect that such a law was a violation of the property rights of foreigners, and the state incurred an international responsibility for such injury, on the theory of expropriation. To the effect that it is not in violation of international law, but that on equitable grounds Italy should grant compensation to foreigners, see Wehberg, H. *Das Völkerrecht u. das italienische Staatsversicherungsmonopol*, Wien, 1912, 25 p.

Clunet states (p. 15) that Uruguay, on the protests of Great Britain and France receded from its position in establishing a monopoly, and limited itself to operating an insurance fund in competition with private companies. Foreign protests against the Italian law have had no such effect. Duguit believes that an action for indemnity should lie, even in the absence of legislative provision, whenever the state establishes a monopoly. *De la responsabilité pouvant naître à l'occasion de la loi*, 27 *Rev. Dr. Pub.* (1910), 637-666. *Ibid.* George Scelle on the Uruguayan law in 30 *Rev. Dr. Pub.* (1913), 637, 653 *et seq.* On the Italian law see also C. Audinet in 20 *R. G. D. I. P.* (1913), 5 *et seq.*, and Lordi, L., *Responsabilité int. de l'Etat italien à raison de l'établissement du monopole, etc.*, Rome, 1913. See, however, J. Barthélemy in 24 *Rev. Dr. Pub.* (1907), 92-101. Other illustrations of successful diplomatic protests against acts of legislation impairing the rights of foreigners, and the award of indemnities, are cited *infra*, § 75.

² Teissier, *op. cit.*, 16. A noteworthy case is that of the law of Sept. 18, 1870 opening to the general public the profession of printer and bookseller, which theretofore had been limited to a few licensed persons, whose rights were very valuable. No indemnity was granted. (Decision of the Conseil d'Etat, April 4, 1879.)

³ Other states have made similar provision for individuals injured by an act of

try this question has been more exhaustively studied than elsewhere, it was formerly the case that executive regulations carrying out a statute were assimilated to acts of the legislature in the matter of immunity from responsibility, provided they were, like legislation, general and impersonal. This is still the general rule, though the *acte réglementaire* has in numerous cases within recent years been regarded as an act of administration simply, and subject to its criteria in the matter of state responsibility.¹ The acts of subordinate committees of the legislature or of bodies to whom the legislature has delegated a portion of its sovereign powers likewise are withdrawn from the revisionary powers of the highest administrative court (the Conseil d'Etat), and from the possibility of state responsibility.²

An important limitation upon the immunity of the state from pecuniary responsibility for acts of legislation is contained in the law of France and probably of other continental countries. French courts have frequently held the state liable in damages to a concessionary with whom it has contracted, for the injuries caused him by the enactment of new legislation which increases the burdens of his concession-contract. There is thus a contractual limitation upon the irresponsibility of the state for legislative acts. The payment of indemnity for increase of the contractor's burdens by legislation is expressly provided for in numerous concession-contracts. When not so pro-

legislation; *e. g.*, Switzerland indemnified the owners of existing distilleries when the Confederation undertook the manufacture and importation of spirits (art. 18 of the federal law of Dec. 23, 1886). Switzerland even indemnified persons financially interested in the culture of absinthe, after having prohibited trade in the liquor drawn from that plant (art. 4 of the federal law of June 24, 1910), 20 R. G. D. I. P. (1913), 21. Opinion of Ernest Roguin in Clunet's Consultation, *supra*, 49. A bill now pending in France (Feb., 1915), prohibiting the sale of absinthe, provides for indemnities to manufacturers.

¹ 25 Rev. Dr. Pub. 38 *et seq.* Despax, De la responsabilité de l'Etat en matière d'actes législatifs et réglementaires, Paris, 1909; Le Roux, Pierre, Essai sur la notion de la responsabilité de l'Etat, Paris, 1909, p. 67; Tirard, *op. cit.*, 150; Sourdois, *op. cit.*, 127. The close relation between a police ordinance (which ordinarily involves no pecuniary liability of the state) and an act of legislation is apparent. Again, the French courts have occasionally had difficulty in distinguishing whether an executive regulation is an *acte réglementaire*, an act of legislation, or an administrative act.

² Teissier, G., V^o Responsabilité, in Bequet's Répertoire de droit administratif, § 27 and cases there cited.

vided for, the legislation must seriously prejudice the rights of the contractor, and the damage must be direct, special, and material, before an action will lie. Thus a decrease in the territorial limits of a district in which a notary was authorized to exercise his functions, thereby diminishing his field of income did not, in France, render the state liable.¹ Where the action lies, the statute or decree is not declared void; the state is merely held liable for the special injury. It is difficult to specify the nature of the legislative act or contract or the extent or directness of the prejudice which would involve the responsibility of the state. The decided cases are the only reliable criterion.²

The limitation upon legislative irresponsibility by contract previously concluded between the state and a private person is of exceedingly limited application in the United States. It has been decided by the Court of Claims that the Government, as a contractor, cannot be held liable for its public acts as a sovereign. For example, a new tariff act increasing the cost of goods to be furnished under a prior contract, constitutes no breach of the contract by the United States.³ Nor does a change of policy on the part of the government involve any pecuniary liability.⁴ The constitutional guarantee against the impairment of the obligation of contract by legislation, would seem to apply to contracts concluded between a state of the United States and a private citizen. The citizen, however, cannot without its consent sue the state for damages in its own or in the federal courts. His rights are protected as far as possible by holding the legislation unconstitutional either under the "obligation of contract" or "due process" clause, which latter would apply also to federal legislation violating contracts concluded by the United States. In a

¹ Aff. Payerne, Cons. d'Etat, Jan. 13, 1865, Leb. 65, p. 52.

² Tirard, *op. cit.*, 238-241 and cases cited; Teissier, *op. cit.*, §§ 25, 26, 162; Ripert, H., Des rapports entre les pouvoirs de police et les pouvoirs de gestion dans les situations contractuelles, 22 Rev. Dr. Pub. (1905), 1-39; Jèze in 24 Rev. Dr. Pub. (1907), 440 and 452; 25 *ibid.* (1908), 61.

³ Deming v. U. S., 1 Ct. Cl. 190; Jones and Brown v. U. S., 1 Ct. Cl. 383; Wilson v. U. S., 11 Ct. Cl. 513. But the highest executive officers appear to have authority to relieve contractors from inequitable burdens thrown upon them by such legislation, 28 Op. Atty. Gen. 121 (Wickersham, Atty. Gen., Dec. 22, 1909).

⁴ Kendall v. U. S., 1 Ct. Cl. 261; 7 Wall. 113.

few countries besides the United States, courts have the power to declare legislation unconstitutional,¹ although there is no pecuniary liability of the state on account of the private damage resulting from the unconstitutional statute.

Legislative officers are universally immune from civil liability for their official acts. Their responsibility is usually political and for penal offenses they are amenable to the criminal courts.

It will be observed later that in the case of international claims for injuries to aliens arising out of acts of legislation, a government cannot always protect itself from liability by alleging that a certain statute or decree violating private rights was an act of legislation and of public power, which in municipal law rendered the state immune from responsibility.

§ 52. Judicial Acts.

The judicial functions of the state being in the highest sense of a sovereign character relieve the state on principle from all civil liability, regardless of the injury sustained by individuals from maladministration of justice. The rehabilitation of wrongly convicted persons is, however, provided for in most civilized states. Within recent years, in addition, practically all the more important countries of continental Europe (Germany, France, Norway, Denmark, Sweden, Austria-Hungary, Spain, Portugal, several cantons of Switzerland), and Mexico as well, have enacted statutes granting an action for indemnity against the state, under certain circumstances, for errors of criminal justice, *i. e.*, for the erroneous detention, conviction and imprisonment of an individual.² A bill to this effect has recently been in-

¹ Full judicial control over legislation appears to exist in Argentine, Greece, Norway and Roumania. In Australia, Canada and the South African Union it is more limited. In various countries, *e. g.*, Portugal, Nicaragua, Honduras, Panama, Cuba, Haiti, Venezuela, Costa Rica, Paraguay and Bolivia the constitution expressly provides that the courts shall disregard unconstitutional laws, but in some of these countries *e. g.*, Haiti, the power is never exercised, and in others, *e. g.*, Bolivia and Costa Rica the legislature has power to construe the constitution.

² The system differs somewhat from country to country. The details are worked out comparatively in Senate Doc. 974, 62nd Cong., 3rd sess., "State indemnity for errors of criminal justice," by Edwin M. Borchard.

troduced in Congress and in several states of the United States. In Wisconsin and California it has already become a law.¹

The liability of judicial officers varies considerably in Anglo-American and in continental law. The overwhelming weight of authority in Anglo-American law is to the effect that the judge having jurisdiction of subject-matter and of parties, whether his jurisdiction be general or limited, is not civilly liable where he acts erroneously, illegally, or irregularly, nor is he liable even for a failure to exercise due and ordinary care, nor where he acts from malicious or corrupt motives. Excess of jurisdiction must, however, be distinguished from absence of jurisdiction. Where the judge knowingly acts without jurisdiction, he forfeits his judicial immunity.² The tendency is to assimilate judges of limited jurisdiction to those of higher courts in their immunity from civil suit, the only distinction being that in the case of superior judges their competence is presumed, whereas in the case of judges of limited jurisdiction, they must prove it.³ Quasi-judicial officers or officers exercising discretionary power, are in general held immune from liability when they have acted within their jurisdiction honestly and without malice.⁴

In countries of the civil law the liability of judges is much greater. On principle the continental judge is liable for his tortious acts in excess or abuse of his power, and in Austria-Hungary the state is subsidiarily liable.⁵

¹ Wisconsin, Chapter 189 of the laws of 1913, creating § 3203a of the Statutes; California, Act of May 12, 1913, Chap. 165 of the laws of 1913.

² Mechem, F. R., Public offices and officers, Chicago, 1890, §§ 628, 629; *Bradley v. Fisher*, 13 Wall. 335, 351; *Grove v. Van Dyne*, 44 N. J. L. 654; *Hughes v. McCoy*, 11 Colo. 591; *Throop*, Public officers, New York, 1892, § 713; 23 Cyc. 568-569 and authorities there cited. By statute, it is in some states provided that a judge is liable in damages for the arbitrary refusal of a writ of *habeas corpus*. This exception to the general rule is rarely invoked.

³ Mechem, *op. cit.*, § 630.

⁴ *Ibid.*, §§ 636-643.

⁵ See, for example, Austria, art. 9 of the organic law of Dec. 21, 1867, and the law of July 12, 1872, on the judicial power and the right of action for torts by judicial officers in the exercise of their functions. Also, Spain, *Ley de Enjuiciamiento Civil*, 1881, art. 903 *et seq.*; Civil Code, §§ 203, 232; penal code, §§ 346-353. Section 505 of the French code of civil procedure provides that judges are liable to civil suit in the following cases: First, if there has been willful wrongdoing (*dol*), fraud (*fraude*),

EXECUTIVE AND ADMINISTRATIVE ACTS

§ 53. Judicial Control.

The executive power has two functions: first, to govern; second, to administer the law. In the sphere of government falls the operation of the public powers according to the constitution, especially intercourse with foreign nations. As an administrator, the state supervises the daily application of the laws in the relations between citizens and the administration and between the various organs of administration. For the first class, acts of government executed usually by the highest organs of the state, the legislature or the judiciary, it has been seen that the state is not responsible, except politically, but that in certain cases the legislature may decree compensation for special sacrifices imposed on individuals in the interests of the public. This has been done on numerous occasions in France by indemnifying the victims of war damages from the state treasury. In the case of administrative acts, a remedy for their illegal exercise by administrative officers is provided either by recourse to the courts or superior

or extortion committed either in the proceedings or in the judgment; . . . Fourthly, for a denial of justice. On the French law, see Biderman, J., *La responsabilité des magistrats envers les particuliers*, Besançon, 1912. The German civil code, § 839, par. 1, provides: "If an officer willfully or negligently commits a breach of official duty incumbent upon him as toward a third party, he shall compensate the third party for any damage arising therefrom." Paragraph 2 provides that "if an officer commits a breach of his official duty in giving judgment in an action, he is not responsible for any damage arising therefrom, unless the breach of duty is punished with a public penalty to be enforced by criminal proceedings." This last clause applies to cases of willful perversion of justice under § 336 of the penal code and includes malicious or corrupt exercise of the judicial power. The commentaries of Planck and Staudinger explain the narrow limitations of par. 2 just quoted. It applies first to a *final judgment only* and does not excuse gross negligence, malice, or corruption. For all intermediate and interlocutory orders and decrees—as in negligently ordering an arrest or attachment, declining to receive evidence, failure to call a witness demanded by a defendant, a disregard of undisputed testimony—the judge is civilly liable and is not protected by the immunity granted in par. 2 of § 839. See Nöldeke, *Die civilrechtliche Haftung des Richters nach dem B. G. B.* in 42 Gruchot's Beiträge zur Erläuterung des deutschen Rechts (1898), 795, at pp. 808, 821-822; Delius, *Haftpflicht der Beamten*, Berlin, Guttentag, 1899, pp. 206 *et seq.* A brief comparative statement of French and English law as to civil liability of judges will be found in 27th Report, International Law Asso. (Paris session, 1912) 659-660.

administrative body for their annulment as in excess of power or *ultra vires* or for their amendment on account of illegality, irregularity or misapplication, as in France, or by the use of the extraordinary legal remedies (or appeal in the federal courts) if in violation of law or of private rights, as in the United States.

The criteria between acts of government and acts of administration have varied from time to time and only the decisions of the administrative courts have furnished a safe basis for determination. The criterion of an act of government, in France for example, has varied from the *political nature* of the act to its *extrinsic form* or *purpose*, and finally to its *intrinsic nature*, which last seems to have become the prevailing doctrine.¹ By decisions of the French Council of State it has in a general way been determined that the following broad divisions of state activity embrace acts of government, for which there is no state responsibility: the relations of the head of the state with the legislature, international relations, acts of war and diplomatic relations, vital measures concerning the internal and external safety of the state, such as the proclamation of martial law or a state of siege, the exercise of the pardoning power, etc. These governmental acts, when constitutionally exercised, escape judicial control in all countries.²

When we come to the injuries caused by the executive power in the exercise of its administrative function, we enter a more difficult field. The state necessarily fulfills its various duties of administration through officers and inferior administrative bodies. What shall be the system of distribution of the losses entailed by a faulty or defective operation or exercise of the administrative function? In other words, to what extent does the individual injured, the offending

¹ Teissier, *op. cit.*, 129. Des actes de gouvernement by Brémond, 5 Rev. Dr. Pub. (1896), 23-75, at p. 29.

² The tendency is to narrow the sphere of these highly privileged acts, and to enlarge the category of administrative acts, which are subject to judicial review. Fabre, J., Des actes de gouvernement, Montpellier, 1898; Michoud, L., Des actes de gouvernement in 1 Annales de l'enseignement supérieur de Grenoble (1889), No. 2, p. 57; Le Courtois, M., Des actes de gouvernement, Paris, 1899. Duguit in his article "The French administrative courts," 29 Pol. Sc. Quar. (1914), 385, 402 minimizes the importance of the distinction between *actes de gouvernement* and *actes de gestion*.

officer, and the state bear the loss of such defective operation of the public service? ¹

¹ The theory of state responsibility, and its foundation in private or public law have engaged the attention of many of the most prominent jurists, who in turn have greatly influenced the decisions of continental courts. In contractual relations, there has been no dispute—the principles of the civil law apply to individual and to state alike. But is the state responsible for tortious acts of officers? If so, why and according to what principles? These are more difficult questions. Modern codes and courts have decided the first question affirmatively—a juristic person may be liable for tort. But as the relation between state and officer is not one of agency or of private law, the state in France is not liable according to private but according to public law principles. In Germany private law is more generally applied to the state. The application of private law to wrongful acts of officers and defective acts of administration was supported by Gierke, Meucci, Laurent, Aubry and Rau and Demolombe, and with distinctions between acts of public power, to which it would not be applicable, and acts of gestion, to which it would be, it was upheld by Zachariae, Prinker, Loening and Piloty, by Ziegler, by Bonasi and Giorgi, by Giron, and by Larombière and Michoud. See exact citations to the works of these jurists in article by Maurice Hauriou, *Les actions en indemnité contre l'Etat pour prejudices causés dans l'administration publique*, 6 *Rev. Dr. Pub.* (1896), 51–65.

The most widely accepted theories of public law responsibility have been: (a) The assumed guarantee by the state of the lawfulness of its official's acts and the compulsion upon the individual to obey the officer. This theory was originated in Germany by Pfeiffer and Zachariae and has the support of Michoud and other French jurists. *Haftung des Staates aus rechtswidrigen Handlungen seiner Beamten* by H. A. Zachariae. *Ztschr. f. d. ges. Staatswissenschaft*, 1863, 582–652. Loening, E., *Die Haftung des Staates aus rechtswidrigen Handlungen seiner Beamten nach deutschem Privat- u. Staatsrecht*. Frankfurt, 1879. *Die Haftung des Staates für rechtswidrige Handlungen und Unterlassungen der Beamten*, by R. Piloty, *Hirth's Annalen des deutschen Reichs*, 1888, 245–271, gives a full account of the theories, as does Michoud in his noteworthy article *De la responsabilité de l'Etat à raison des fautes de ses agents*, 3 *Rev. Dr. Pub.* (1895), 401–429; and 4 *ibid.* 1–31; 251–285. See also Marcq, René, *La responsabilité de la puissance publique*, Paris, 1911, p. 316 *et seq.*; and Sourdois, *op. cit.* (b) The theory of professional risk or social insurance, according to which the sacrifices and losses entailed by injurious acts of administration should be distributed among the community at large. This was until lately the theory of Hauriou, a leading French authority, and of Otto Mayer. The question of fault of the officer is immaterial in the application of this theory, Hauriou, article cited, and also in the 3rd ed. of his *Précis, op. cit.*, 174 *et seq.* In the 4th and following editions, the theory is abandoned for the "fault" theory in acts of gestion, public and private (*infra*, p. 135); Mayer, Otto, *op. cit.*, and article *Die Entschädigungspflicht des Staates nach Billigkeitsrecht*, *Vortrag in Gehe- Stiftung*, Dresden, 1904. (c) General equity, the theory of Brémond and Teissier (Brémond, *op. cit.*, and Teissier, *op. cit.*) which is gaining support in the recent decisions of the French and German administrative courts. Each invasion of private rights and interests by the administration is judged upon its own merits in justice.

THE FRENCH SYSTEM

In order to adjust the decisions of the Council of State to a satisfactory classification and theory of responsibility, the French jurists, who have devoted more attention to this subject than those of any other country, have been impelled to draw fine distinctions among the various acts of administration. These distinctions of the French law have greatly influenced the Latin countries of Europe and of America. Besides, in France, the individual enjoys a higher degree of protection against illegal, improper, imprudent or merely injurious acts of the administration than in any other country. For these reasons the French system merits special attention and will be discussed first.

§ 54. Different Classes of Administrative Acts. Recourse of Individual and State Responsibility.

One large class of administrative acts that may violate private rights are acts of police, or, as they are sometimes called, acts of authority, or the exercise of the police power in the general interest by ordinance or administrative decree. The distinction between acts of government and acts of police is often vague; the former, it can only be said, are usually political in character, whereas the latter are not. These acts in exercise of the police power if illegal or in excess of jurisdiction give rise to an action for annulment as in excess of powers or *ultra vires* before the Council of State, but in theory at least the state cannot be held liable in damages. In recent years, the theory has in several cases been abandoned, the state having been held pecuniarily liable to individuals for the defective operation, even without fault, of its police service. The Council of State has decided that there is an excess of power in case of (1) incompetence, when the administrative authority encroaches upon the competence of some other authority; (2) defect of form, when the formalities required by law are not followed by the administrative authority; (3) violation of substantive law; and (4) misuse or *détournement* of power, when an administrative authority even though acting within its competence and following the necessary formalities, uses its dis-

cretionary power for purposes other than those for which the power was granted.¹

Where acts of police violate previously concluded contracts between the state and an individual, *e. g.*, a permit for a bridge near to another, to the builder of which a monopoly had been granted, or increase materially the burdens of the contractor, an action for annulment or for damages has on several occasions been held to lie.² Moreover, where acts of police are merely disguised acts of *gestion*, *e. g.*, where they add to the financial resources of the state, an action lies against the state, as it does where by statute a right of action is granted.

The other large class of administrative acts are acts in administration of the public service and are called by certain authors "acts of public *gestion*," as contrasted with and yet as related to "acts of private *gestion*" or the administration or management of the private domain and property of the state.³ For unlawful acts of *gestion*, the state may be held responsible in damages by means of the administrative litigation (*contentieux administratif*) before the Council of State, if an act of public *gestion*, or before the ordinary courts, if of private *gestion*.⁴ The distinction between acts of authority and acts

¹ Goodnow, *op. cit.* II, 230 citing Aucoc, *Conférences sur l'administration*, I, 467. See also Wodtke, Fritz, *Des recours pour excès de pouvoir*, Tübingen, 1912; Dareste, P., *Les voies de recours contre les actes de la puissance publique*, Paris, 1914. We cannot enter into a detailed study of the four kinds of recourse against administrative acts: (1) full jurisdiction, which has the force of a judgment and may reform or amend the act; (2) annulment, which can only cancel it; (3) interpretation; (4) repression, which is equivalent to an injunction or prohibition. See Alcindor, L., *Des différentes espèces de nullités des actes administratifs*, Paris, 1912. See also H. Berthelemy, *De l'exercice de la souveraineté par l'autorité administrative*, 21 *Rev. Dr. Pub.* (1904), 209-227; L. Duguit in 29 *Pol. Sc. Quar.* (1914), 385, 393 *et seq.*

² Ripert's article *supra*. See also section *Situations contractuelles* in works cited on *Responsabilité de l'Etat*.

³ Hauriou, *Précis*, 6th ed. 410; Bigot d'Engente, A., *De la responsabilité pécuniaire de l'Etat en matière d'actes de puissance publique*, Paris, 1907, p. 4.

⁴ Laferrière, *op. cit.*, II, 187, 191. The matter of appropriate jurisdiction is among the most important questions in French administrative law. The administrative courts have an enumerated, but exceedingly extensive jurisdiction. Laferrière, I, 674 *et seq.*; Brémond, J., *Traité de la compétence administrative*, Paris, 1894; *De la compétence dans les actions en responsabilité contre l'Etat* by J. Perrinjaquet, *Rev. Gen. du Dr.*, 1909, 112-126; 218-231. See also Goodnow, *op. cit.*, II, 226 *et seq.*, and L. Duguit in 29 *Pol. Sc. Quar.* (1914), 385, 401 showing the tendency to give the administrative courts jurisdiction of all suits against the state.

of *gestion* is vague and uncertain, and has been worked out inductively from the decisions of the Council of State holding the state immune from or subject to responsibility for particular administrative acts.¹

Among acts of private *gestion* are included the exercise of the state's functions as a property owner, as the entrepreneur of an industry, such as the tobacco and match industry in France and Italy and the porcelain industry in Prussia, or in the operation of certain public utilities, such as state-owned railroads in most of the countries of Europe. In these matters, either by legislation or judicial decision, the state in France as elsewhere is subject to the principles of private law.

The liability for acts of public *gestion* or operation of public works is determined according to principles other than those governing private legal relations. In the celebrated Blanco decision which determined the jurisdiction of the French Council of State in suits against the state arising out of the administration of the public service, it was held that the responsibility of the state for injuries caused to individuals by acts of persons whom it employs in the public service cannot be governed by the principles established by the civil code for the relations of individual to individual; that this responsibility is neither absolute nor general; and that it has special rules which vary according to the needs of the service and the necessity of reconciling the rights of the state with private rights.² From this decision the equitable nature of the decisions of the Council of State will become apparent, each defective act of administration being judged on its merits.

Some of the services in which the state has been held responsible on the theory that there has been a defective operation of an act of public *gestion* or service have been torts of treasury officers on the verifi-

¹ Grivellé, *De la distinction des actes d'autorité et des actes de gestion*, Paris, 1901; Hauriou, *La gestion administrative*, Paris, 1899; Le Roux, *op. cit.*, 102. Duguit in 29 Pol. Sc. Quar., 402-403 minimizes the distinction.

² Tribunal of Conflicts, 8 Feb. 1873, Dalloz, 73, 3. 20; Sirey, 73. 2. 153. The Council of State may pass likewise upon the liability to individuals of departments, communes, etc., according to the Feutry decision in 1908. Duguit in 29 Pol. Sc. Quar., 401.

cation of bonds, injuries caused to a private display at a state exposition, damages caused by soldiers or by army horses in actual commanded services, *i. e.*, under orders of an officer, accidents caused to workmen in government arsenals, injuries to private property in target practice, loss of documents confided to public authorities, damages by collision between public and private vessels, damages caused to vessels by negligent acts of port officers, and other cases.¹ By statute, damages are granted to individuals prejudiced by the defective operation or injurious results of various public services. So, for example, a limited compensation is granted for losses in the postal service; for erroneous tax and customs collections; for temporary occupation of property in carrying on public works or in erecting public buildings; for military requisitions; for property taken for defense in war times prior to actual belligerent engagements; and in many similar cases which may be assimilated to quasi-expropriation.²

In Germany, the activity of the *fiskus*, for which liability is admitted in principle, includes what the French designate as acts of *gestion*, both public and private. The German state is liable as a *fiskus* in its character as the owner of real property, of public works, domains, forests, roads, and provision magazines; when it emits loans or derives money from various sources of revenue notably commerce in tobacco or salt, or establishes a lottery, operates a railroad or a telegraph service (though here the officer rather than the state is made liable), or when through its officers it enters into contracts or other acts necessary to the administration or development of these various undertakings. In Germany, Austria and Switzerland the private law of obligations, including contractual and non-contractual liability,

¹ Teissier, *op. cit.*, 153 *et seq.*; Michoud in 4 *Rev. Dr. Pub.* (1895), 6; Le Roux, *op. cit.*, 102; Sourdat, A., *Traité général de la responsabilité*, 6th ed., Paris, 1911, p. 393 *et seq.*; Roger, L., *De la responsabilité civile de l'Etat*, Paris, 1900, p. 48; Duguit, Léon, *De la situation des particuliers à l'égard des services publics*, 24 *Rev. Dr. Pub.* (1907), 411-439.

² The Act of May 3, 1841 governing expropriation for public use (art. 48) has been amended by art. 2 of the law of April 21, 1914, confining the compensation to the actual and certain damages caused by the eviction. A discussion of the liability of France for injuries inflicted in war operations is contained in Vaulx, H. de, *La responsabilité de l'état français à raison des dommages causés par les faits de guerre*, Verdun, 1913.

is applied to the state to a much greater extent than in France, although, as a matter of fact, while the French administrative courts firmly deny the applicability of the principles of the civil code, the doctrines of liability of private law are nevertheless generally applied.

§ 55. Respective Liability of State and Officer.

One of the most important consequences in France of the division between acts of private and public *gestion* concerns the respective liability of the state and the officer. In the former case, private *gestion*, the state is responsible for all the faults of its employees within the scope of their authority according to section 1384 of the civil code. In the latter case, *gestion* of the public service, on the contrary, the state is only liable for such defects in the service as are not due to the grave fault or personal malice of the administrative officer. In other words, the courts distinguish between a fault of the service and a personal fault. The first may be the result of an administrative act badly or imprudently executed, or of an order carelessly given or understood; the second consists of gross faults, torts or malfeasance in which the personal passions of the officer predominate over the defect in the service. For these personal acts, the officer alone is liable before the judicial tribunals, without any liability of the state; but the administrative courts, in order to prevent an individual recourse against an officer from bringing into question an act of administration, thereby infringing the time-honored principle of the freedom of the administration from interference by the courts, have reserved the right to determine by preliminary inquiry whether the wrongful act in question was an official administrative or a personal fault.¹ In England and

¹ Further details must be omitted. As to the French administrative jurisdiction see Goodnow, *op. cit.*, II, 217 *et seq.*, and as to the Tribunal of Conflicts, Goodnow, II, 257. See also Dicey, A. V., *Law of the constitution*, 7th ed., London, 1908, ch. XII, particularly p. 395. Some of the misconceptions of Dicey's view of the French system are pointed out in Edmund M. Parker's criticism of the 6th ed. in his article *State and official liability*, 19 *Harv. L. R.* (1905), 335-349 and of the 7th ed. in 3 *Amer. Pol. Sc. Rev.* (1909), 362-370. See also Laferrière, *op. cit.*, II, 189. It is often exceedingly difficult to distinguish the excess of power (for which an appeal for annulment will lie) from the defect of service (for which an action lies against the state) and from the personal fault (for which an action lies against the officer). It seems that the action for annulment and against the officer for damages may be brought for

the United States, personal liability of officers is much greater, for not merely the malicious exercise or abuse of power, but all excess of authority, use of excessive force, invasion of private right by mistake of his authority or of the law or in the existence of certain facts upon which his action depends, or even, in this country, an act under apparently lawful authority but resting upon an unconstitutional statute—all these are considered personal acts of the officer which render him liable.¹

A principle which long prevailed in French law, and has its counterpart in the law of most of the continental countries, provided that the officer cannot be sued without the preliminary consent or authorization of the higher administrative courts. This was an inheritance from the Roman law, and was intended not merely to prevent invasions of the administrative competence by the judicial tribunals, but also to protect the officer from unjust suits. This preliminary administrative decision was provided for by art. 75 of the Constitution of the year VIII, but it has been repealed in France by the decree of Sept. 19, 1870, which instead penalizes the institution of any vexatious or unjustified suit against an officer.²

§ 56. Limitations on State Liability for Administrative Acts.

The distinction between acts of police and acts of *gestion* of the public service has, by recent decisions of the German and French administrative courts, become vague, partly because cities have been held to a considerable responsibility for the maladministration of police functions and partly because certain acts of police formerly involving an immunity from responsibility have lately been held to give rise to a right of action.³

the same act. See Laferrière, I, 646. See an interesting thesis by Jean Depaule, *Etude historique sur la responsabilité des fonctionnaires publics*, Carcassonne, 1902, especially pp. 107, 189.

¹ Ernst Freund in article Private claims against the state, 8 Pol. Sc. Quar. (1893), 646. The tendency now is to relieve the officer from pecuniary liability for acting under a statute later held unconstitutional. As to the distinction, in English law, between misfeasance and non-feasance in the liability of public authorities, see W. Harrison Moore in 30 Law Quar. Rev. (1914), 276-291; 415-432.

² Goodnow, *op. cit.*, II, 171 *et seq.*; Laferrière, *op. cit.*, I, ch. VII, 637 *et seq.*

³ The decisions of the Council of State since 1903, which indicate the new trend

There is no longer any safe criterion for establishing the non-responsibility arising out of acts of police. While practically every administrative act may give rise to the responsibility of the state, there are nevertheless numerous limitations on any potential liability. First, acts which are non-contractual and regular in form can give rise neither to an action for annulment nor indemnity, in the absence of statute. Similarly, those which may be judicially corrected by annulment for excess or wrongful use of power or illegality or irregularity give rise merely to administrative appeal. General administrative acts give rise to an action for indemnity only when they are directed against particular individuals and then only when the illegality cannot be cured by an action for annulment and when the illegal execution of the act has violated the legal right of the individual.¹ Again, the fault which would render the state liable must be strictly a defect in the service and not be due to a personal fault of the officer. Similarly, the state is relieved from liability by *force majeure*, or where the injury is caused by the negligence of the victim, or by a third person, or where the state, as is frequently the case, exonerates itself by express legislative provision, *e. g.*, for the destruction of infected animals, for quarantine, etc.² In general, the lawful operation of a public service, even though it causes injury, renders the state immune from responsibility except where especially undertaken by statute. Moreover, the damage must be direct and not remote; it must be material; it must be certain and not merely probable; and it must be present and actual and not merely future.³

§ 57. Liability of Municipalities.

The theory of responsibility in the continental countries is practically the same in the case of all governmental bodies, the state, city, commune or district. It is based upon the theory of the juristic person. In France, some slight differences are to be noted in the responsibility

of the law are presented chronologically by Sourdois, *op. cit.*, 50 *et seq.* Teissier, as one of the judges of the Council of State, has had an important influence in shaping the law. See also Duguit in 29 *Pol. Sc. Quar.*, 402-403.

¹ Teissier, *op. cit.*, ch. III, § 2.

² *Ibid.*, ch. III, § 3.

³ *Ibid.*, ch. IV.

of the state and of the commune. While admitting the distinction between acts of police and acts of *gestion*, the commune is in far greater degree subject to private law than the state. For example, acts of public *gestion* are, like those of private *gestion*, subject to private law rules. Again, the commune is not, like the state, relieved from liability because of the personal fault of an officer, but incurs a subsidiary liability.¹ In Anglo-American law, the municipality is subject to rules quite different from those governing the state and other governmental bodies, inasmuch as it is liable for corporate acts, but not for governmental acts (in close analogy to the European system), whereas the state on principle escapes responsibility for all acts and has admitted liability for little more than contractual obligations. The decentralized system of administration in Anglo-American law, by which local bodies may be freely sued, combined with a theoretical plenitude of liability on the part of officers may in some degree explain the non-liability of the state, whereas the centralized system of European administration demands a greater centralized liability. Communes in France, are, like the state, liable for all direct and personal damages occurring in the execution of public works, whether due to fault or not, a rule differing widely from the Anglo-American practice.

The provision of the French law of 10 Vendemiaire an IV, incorporated with modifications in articles 106 to 109 of the law of April 5, 1884, according to which communes are responsible for injuries to the person or property of private individuals due to mob violence, has been adopted in the law of many of the civilized countries. It prevails in many of the states of Germany, in Austria, in Belgium and in several states of the United States. In France, the commune is relieved from liability if it can prove that all possible precautions were taken to prevent the assembling of the mob and to make its author known, or when the municipality had no local police or armed force.²

¹ Peeters, *Traité général de la responsabilité des communes*, Paris, 1888; Sourdat, *op. cit.*, 6th ed. II, 440-452; Michoud, L., *De la responsabilité des communes à raison des fautes de leurs agents*, 7 *Rev. Dr. Pub.* (1897), 41-84; Valerius, A., *Organisation, attribution et responsabilité des communes*, Paris, 1912, v. 3.

² Sourdat, *op. cit.* II, 453-479; Degroote, Henri, *De la responsabilité de l'Etat et des communes à raison des dommages occasionnés par les émeutes*, Paris, 1906; Poissonier, Paul, *De la responsabilité de l'Etat et des communes à raison des dom-*

A recent law of April 16, 1914 amends articles 106–109 of the law of 1884 by making the state share responsibility with the commune, the proportion depending upon the degree of fault of the officers of the state. The theory of fault is superimposed on the theory of risk in the incidence of liability. The law of 1884, however, is still applicable to the city of Paris.¹

§ 53. *Resumé.*

To summarize the French system: Administrative acts are divided into acts of police and acts of *gestion*. Acts of police if illegal or in excess of jurisdiction may be annulled for excess of powers, but in theory, at least, no action lies against the state for damages. But if in violation of contract, the state is liable. Acts of *gestion* are either private or public. The former involve the liability of the state as a private person. The latter, public *gestion*, embrace acts in administration of the public service. The state is usually held responsible for defective and injurious acts of this kind, unless the fault of the administrative officer is so purely personal to himself and not incidental to the public service that the state is relieved from and the officer alone charged with liability. Principles of public rather than private law are applied to determine state liability. The recent tendency is to narrow the sphere of acts of police by widening the scope of acts of public *gestion*, and consequently to enlarge the responsibility of the state.

THE GERMAN SYSTEM

§ 59. *Judicial Control over Acts of Administration.*

The German administrative system in the matter of judicial control over the acts of the administration in protection of private rights is very similar to the French. The administration acting as a public power is practically free from judicial control except in so far as liability of the state for wrongful acts of its officers has been assumed by the imperial act of 1910 and certain statutes in the states of the Empire. In addition, in a few cases the law has given the ordinary courts

images occasionés par les émeutes, Paris, 1912; Beaudouin, M., *De la responsabilité des communes et de l'Etat en cas de troubles ou d'émeutes*, Paris, 1912.

¹ 31 Rev. Dr. Pub. (1914), 445–448.

a limited control over certain acts of the administration—a right of appeal from decisions of inferior boards, such as those of the police authorities in certain cases, allegations of unjust arrest, disputed amounts of indemnity in cases of eminent domain, disputed assessments of taxes and protests against unlawful acts of police authorities. While the control of the ordinary courts is somewhat larger than in France, still by far the greater share of judicial control over acts of the administration is given in the larger states to the administrative courts. Decisions of the ministers, however, *e. g.*, in Prussia, are not generally subjected to any administrative jurisdiction. The appeal for excess of power or *ultra vires* is unknown to the Prussian system. There is no administrative appeal against general acts of administration or ordinances. Only a special administrative act is subject to such appeal, although, as in Belgium, Denmark and other countries, the question of the validity of the ordinance may be considered collaterally and the enforcement of rights under it refused. Only such special acts as tend to violate private rights may be appealed from, provided a statute grants the right of appeal. The necessity for statutory provision is, however, dispensed with in the case of acts in exercise of the police power. This appeal has a suspensive effect on the administrative act, similar to the American remedy of injunction.¹

§ 60. Pecuniary Liability of the State.

In the matter of pecuniary liability for wrongful acts of officers, Germany adopts the well-known distinction between the activity of the state as a *fiskus*, the broad application of which has already been noted, and its activity as a public power. In the former case the liability of the state is one of private law by the application of articles 31 and 89 of the Civil Code, which relate to the liability of juristic persons. Section 31 reads:

¹ Goodnow, *op. cit.*, II, 243 *et seq.*; Perlmann in 34 *Zeschr. f. d. privat u. öff. Recht.* 98; Sarwey, O. von, *Das öffentliche Recht u. die Verwaltungsrechtspflege*, Tübingen, 1880, 92, 401; *Der Begriff des Rechtsschutzes im öffentlichen Rechte* by Karl F. v. Lemayer, 29 *Ztschr. f. d. privat u. öff. Recht* (1902), 1–228 particularly 80 *et seq.* Prof. Arndt in an article *Haftung für polizeiliche Eingriffe*, 40 *Jur. Wochenschrift* (Nov. 15, 1911), 921 criticizes the distinction between non-liability for police interference through a general ordinance, and liability for interference by special order

"The association is responsible for any damage which . . . a duly appointed agent may cause to a third person by an act giving rise to a claim for compensation, provided that such act was done in the execution of its or his official duties."

and section 89 provides that:

"The provisions of section 31 apply *mutatis mutandis* to the fiskus as well as to corporations, foundations and institutions under public law."

This responsibility of the fiskus as a subject of property and fiscal rights, involving the relation of agency between the state and the employee, must be founded on an act which would involve the liability of the agent himself and which is committed *in* the exercise of his functions and not merely on the occasion of their exercise. Before the Civil Code came into force in 1900, if the officer exceeded his powers or jurisdiction or omitted duties incumbent upon him, he was personally liable according to article 13 of the act of March 31, 1873, following in this respect the Prussian law of February 13, 1854. The officer's liability for wilful and negligent acts is now governed by section 839 of the Civil Code which provides:

"If an official wilfully or negligently commits a breach of official duty incumbent upon him as toward a third party, he shall compensate the third party for any damage arising therefrom. If only negligence is imputable to the official, he may be held liable only if the injured party is unable to obtain compensation elsewhere."

The liability of the state for administrative acts as a public power was left to the states of the Empire by article 77 of the introductory act of the Civil Code, which provides:

"The provisions of State laws remain unaffected which relate to the liability of the State, or of the communes and other communal unions (provincial, circuit, and district unions), for any damage caused by their officials in the exercise of the public authority entrusted to them; similarly the provisions of the State laws remain unaffected which exclude the right of an injured party to require compensation from the officer for such an injury, in so far as the State or the communal union is liable."

In eleven German states the liability of the state for the acts of its officers is under this section admitted by legislation. In six states, Bavaria, Wurttemberg, Baden, Coburg-Gotha, Reuss (j. L.) and

since August 1, 1909, in Prussia, the state's liability is primary and exclusive, and in five others, Hesse, Weimar, Schwarzburg-Sondershausen, Reuss (ä. L.), and Alsace-Lorraine, the liability of the state is subsidiary. In Saxony, by customary law, the liability of the state is recognized. Mecklenburg and Anhalt with a few minor exceptions have denied all liability. In the other states the law varies greatly, but the principle of liability is denied.¹ Except as admitted by special statute, there is no liability for lawful exercise of the public power.²

On May 22, 1910, an imperial statute, very similar to the Prussian act of 1909, on the liability of the state for the acts of its officers, was enacted. It relates to the liability of the Empire for the acts of imperial officers.³ Under the Prussian and imperial statutes, if the officer in the exercise of the public power intentionally or negligently violates his official duties toward a third person, the responsibility of the officer provided for in section 839 quoted above is cast upon the state.⁴ In other words, the state has substituted its own liability for

¹ Haftung des Staates u. der Gemeinden für ihre Beamten, by Otto Gierke, Deutsche Juristen-Ztg. 1909, 18-28; Die Haftung des Staates aus rechtswidrigen Handlungen seiner Beamten, by A. Dock, 16 Archiv f. öff. Recht, 244-279, particularly 257 *et seq.*; Die Haftung des Staats für den durch seine Organe u. Beamten dritten zugefügten Schaden, by Karl v. Stengel, Hirth's Annalen des deut. Reichs, 1901, 481-508, 561-592; Klingelmüller, Die Haftung für die Vereinorgane nach § 31 B. G. B., Breslau, 1900 (Heft 3 of Leonhard's Studien); Hatschek, J., Die rechtliche Stellung des Fiskus im B. G. B., Berlin, 1899; Extract from 7 Verwaltungsarchiv, 424-480, particularly 436 *et seq.*; also *V^o Fiskus* in Stengel's und Fleischmann's Handwörterbuch, 2nd ed.; Otto Mayer, Deutsches Verwaltungsrecht, 1st ed., I, 47 *et seq.*, II, 65 *et seq.*; Bonnard, Roger, De la responsabilité civile des personnes publiques et de leurs agents en Angleterre, aux Etats-Unis et en Allemagne, Paris, 1914, 209-229.

² *E. g.*, in case of expropriation the liability is admitted. Anschütz, G., Der Ersatzanspruch aus Vermögensbeschädigungen durch rechtmässige Handhabung der Staatsgewalt, Berlin, 1897. Extract from Verwaltungsarchiv.

³ Die Haftung des Staates für Amtsdelikte bei Ausübung der öffentlichen Gewalt nach preussischem Rechte, by Robert Coester, 5 Jahrbuch d. öff. Rechts (1911), 285-331; Gutachten of Gierke in 28 Deutscher Juristentag, I, 102, of Herrnritt, *ibid.* II, 324 and of Wildhagen, *ibid.* III, 133; Salman, R., Haftung für Beamte in Preussen u. im Reich, Berlin, 1911; also in Jur. Wochenschrift, 1911, 78-80; Delius, Hans, Haftpflicht der Beamten, Berlin, 1909; Koerner, W., Die Beamten-Haftpflicht im Reiche u. in den Bundesstaaten, Berlin, 1911; Bonnard, R., *op. cit.*, 209 *et seq.*

⁴ The laws of the German states modify § 839 by reason of the provisions of §§ 77, 78, and 218 of the Introductory Act to the B. G. B. Up to the act of 1910, the duty of the state to make compensation for unlawful acts of imperial officers (in the

that of the officer in favor of an injured individual. The liability of the state is primary and excludes that of the officer, the state merely reserving a subrogated right of recourse against the offending officer. Soldiers are included among the officers covered by the statute, but the responsibility of the state is excluded in case of officers who are remitted only to the collection of fees from private persons.

The civil courts have jurisdiction, with the proviso that the state may raise the jurisdictional conflict, in which case, in Prussia, the highest administrative court, the *Oberverwaltungsgericht*, must first decide whether there has been an excess of power or omission of duty on the part of the officer. In this respect the statute is similar to the French system of judicial-administrative control over administrative acts.¹ The statute applies to the minor administrative subdivisions of the state. If the individual is injured, however, by a police ordinance the action can only be brought where, after an administrative appeal, the ordinance has been declared illegal or invalid. The acts do not repeal other statutes limiting state liability, *e. g.*, in postal and telegraph matters, accident insurance, etc.

A provision of some importance for present purposes is that foreigners may claim only if they prove, by proclamation published in the *Gesetzblatt*, that by reciprocity, in treaty or legislation, their own country grants similar rights to aliens. According to the statutes of Bavaria, Wurttemberg, Baden, the Mecklenburgs, both Reusses, Anhalt, Schwarzburg-Sondershausen, Saxony, and Alsace-Lorraine aliens may be denied the right to compensation if they do not prove that their own state recognized a corresponding liability in favor of Germans. In Hesse and Saxe-Coburg reciprocity must be proved, and this applies to non-nationals of the state. Moreover, Baden, Reuss (j. L.)

exercise of the public power) was regulated only by § 12 of the Land Registry Act, which covered the acts of recording officers, and by the laws of 1898 and 1904 concerning the liability of the state for errors in the administration of the criminal law. See Borchard, State indemnity for errors of criminal justice, Sen. Doc. 974, 62nd Cong., 3rd sess.

¹ A similar preliminary administrative decision is required in Bavaria, Baden, Hesse and Alsace-Lorraine. See Gravenhorst, G., *Der sogenannte Konflikt bei gerichtlicher Verfolgung von Beamten* (Abh. aus dem Staats-und Verwaltungsrecht. 15. Heft.), Breslau, 1908.

and Saxony require a primary liability from the foreign state. Bavaria and Wurttemberg are satisfied with a subsidiary liability.¹

In accordance with section 839 of the Civil Code the liability of the state is excluded if the officer is only guilty of negligence and if the injured person may be compensated in other ways. The state is likewise relieved of responsibility if the injury is committed by a judge without a criminal penalty attaching; if the injured person has failed intentionally or negligently to avoid the injury by legal means; or if the officer under section 839 was not himself responsible for the act, but only an assistant.

The imperial statute contains a provision analogous to the peculiar Anglo-American doctrine of "act of state" (*infra*, p. 174) by providing that state liability is excluded for acts of officers in the foreign service in so far as the chancellor declares them to have had a political or international importance.

Both in France and in Germany communal officers are not always appointed by the commune or local administrative body, but by the state; nevertheless, the state is not responsible for officers who do not act directly in its behalf. If the officer was appointed in the service of the commune, the latter is liable. The statute does not relate to minor public boards, such as school boards.

SYSTEMS OF OTHER EUROPEAN COUNTRIES

§ 61. Spain.

The Spanish system of judicial control over the administration resembles closely that of France. Since 1888 the administrative courts have had a very large control over administrative acts, and the Consejo de Estado sitting in committee of the whole acts as a Tribunal of Conflicts in case of jurisdictional doubts. Officers are liable for personal faults, as in France, and an administrative decision may be invoked to prevent the ordinary courts from assuming jurisdiction over an administrative act. The state is liable under the civil code for official torts and breaches of contract of its officers, but curiously only when the state acts tortiously through the agency of a *special* officer, and not when the act is committed by a regular competent official of the

¹ Dock in 16 Archiv f. öff. Recht, 273.

state. If the act, however, is one which the state should by law perform or perform properly, any omission or negligent execution of the act will involve its responsibility, although this liability is avoided by proof that it has taken all precautions to prevent the injurious act. The state has a right of recourse against the wrongdoing officer. This system, both in requiring the agency of a special officer to render the state liable and the limitations upon state responsibility incurred through the act of a general officer, in conjunction with the necessity for preliminary administrative consent before an officer may be sued, weakens considerably the recourse of an individual against an injurious administrative act.¹

The Act of April 5, 1904, on the civil responsibility of public officers, somewhat increased the remedies of the individual. It provides that public officers who in the discharge of their duties, by act or omission, violate any precept whose observance has been claimed from them in writing, shall be compelled to indemnify the person injured for the damage sustained. The superior hierarchy which expressly approves the act or omission, shall assume responsibility, exonerating the inferior officers. Even a minister may under this law be made responsible before a committee of the Senate.²

§ 62. Italy.

In Italy, in 1865, the French system of judicial control was abolished and one similar to that of Belgium instituted. In 1889, however, the French system was reëstablished, except that the judicial tribunals have a much greater jurisdiction than they have in either France or Spain. In fact, in this respect, it is more like the German system. Individuals in Italy have recourse against administrative decrees or measures for excess of power or violation of law, under the following limitations: (1) the recourse for excess of power will only be received by the courts if the administrative decree or measure attacked has been previously appealed to higher administrative officials and the appeal rejected; (2) when the administrative act concerns matters of recruit-

¹ Laferrière, *op. cit.*, I, 27-36; Pascaud, *op. cit.*, in 24 Rev. Gen. du Dr. (1900), 498-499; Marvin, G., La juridiction contentieuse en Espagne. Rev. Dr. Pub., 1906, 650-661; and works of Caballero and González, *supra*.

² Santamaria de Peredes, V, Curso de derecho administrativo, Madrid, 1911, p. 116.

ing or customs, recourse is open only for incompetence and excess of power, and not for violation of law; and (3) no recourse is admitted against measures of the government acting as a political power. The discussions as to what is included under political power correspond largely to the French discussions concerning acts of government.¹

The Italian law as to responsibility of the state for acts of officers follows closely the classic distinctions between acts *jure imperii* and acts *jure gestionis*. In the latter case alone is responsibility admitted, and then according to the rules of the private law, being in this respect more nearly analogous to the German than to the French system. This is perhaps due to the fact that the judicial tribunals are competent in actions against the state, although the administration may raise the conflict if it believes the act in question was done *jure imperii*.

Officers are liable for gross faults, but preliminary consent of the Council of State must be obtained before an action can be brought against them for acts relating to their office. The ordinary rules of liability for fault have been modified by the courts with respect to officers. For example, they are not responsible for simple errors of law "unless they reveal a complete ignorance of the elementary rules of the profession"; nor for faults committed when it is absolutely impossible to conform to the law; nor for acts done in executing orders from a legitimate authority not having a character manifestly wrongful and illegal; nor, finally, for acts done in case of extreme urgency and for the public interest.²

¹ Laferrière, I, 73, citing Bertolini, P., *Delle garanzie della legalità in ordine alla funzione amministrativa*, Rome, 1890, 209.

² Laferrière, I, 83-84, citing Bonasi, *Della responsabilità penale e civile dei ministri et degli ufficiali pubblici*, Bologna, 1874, pp. 330, 346, 349 and Giorgi, *Teoria della obbligazione*, Florence, 1882, vol. V, 284. See also Pascaud, *op. cit.*, 24 *Rev. Gen. du Dr.* (1900), 500; Sarwey, *op. cit.*, 202. Italy has an extensive literature on this special subject, second only to that of France. Among the more important contributions which have been examined are the following: Giliberti-Messina, A., *Responsabilità civile dello stato e delle altre persone giuridiche per fatti ingiusti dei propri agenti*, Palermo, 1909; Giaquinto, A., *La responsabilità degli enti pubblici*, v. II, *teoria speciale*, 2nd ed., S. Maria, 1914; *La responsabilità della pubblica amministrazione in relazione alle giurisdizioni amministrative*, by E. Presutti, 41 *La Legge*, 139-144, 208-216, 354-360, 389-396 and 42 *La Legge*, 6-7; *Della responsabilità indiretta delle amministrazioni pubbliche*, by L. Meucci, 21 *Archiv. giur.* 341-406; *Alcune osservazioni sulla responsabilità dello stato per i danni cagionati dai pubblici*

§ 62a. Austria-Hungary.

In Austria, up to 1867, there was no administrative court having the power to reform or annul decisions of administrative authorities within their jurisdiction, but in violation of the law or of the rights of private parties. The diets and their committees in the affairs of the province, and the ministers in matters of the state, enjoyed most extended powers, entirely free from judicial control. But the law of December 20, 1867, which separated justice from the administration, provided that individuals injured by administrative decisions or measures might have recourse against the official or board before the High Court of Administrative Justice, which was brought into operation by the law of October 22, 1875. For a violation of political rights, the Supreme Court is competent. Recourse is usually had for annulment of the protested act, reformation being rare. The individual also must have exhausted his appeals to the highest administrative authorities. The Supreme Court acts as a tribunal of conflicts between the judicial and administrative competence.¹

There is no provision of law in Austria which renders the state liable for the acts of its officers, except in a subsidiary way for the acts of judges (*supra*, p. 130, note 5). The constitutional law of December 21, 1867 did hold employees of the state responsible for the observance of the laws in their official acts, and made provision for a subsequent law defining the liability of the state. But this official responsibility seems to be limited to a disciplinary control, for inasmuch as no law has been passed carrying the constitutional provision into effect, the courts have been loath to hold the state responsible in damages for acts of its officers, and the civil liability of the officer is exceedingly limited. Numerous statutes, such as the patent act, expropriation

ufficiali, by O. Sealvanti, 2 Riv. Dir. Pub. (1892), 149-173; La responsabilità dello stato per gli atti dei suoi funzionari, by A. Bonasi, 1 Riv. Ital. p. 1. sc. giur. (1886), 1-33, 177-190; Della responsabilità dello stato in Gabba's Questioni di diritto civile, Turin, 1885, p. 109. On the responsibility of officers see especially Mottola, Domenico, Trattato in diritto amministrativo sulla responsabilità degli ufficiali di governo e pubblici funzionarii, Catanzaro, 1894; La responsabilità dei pubblici funzionarii, by G. Quaranta, 16 Il Filangieri, 273-297, 321-343, 418-443 (a good comparative study); and La responsabilità dei pubblici ufficiali, by S. Scolari, 25 Nuova Antologia, 475-490.

¹ Sarwey, *op. cit.*, 203 *et seq.*; Laferrière, I, 60.

act, customs act, etc., provide for the liability of the state, usually in cases where the state is enriched at the expense of the individual.¹ Projects for a law to render the state liable for the unlawful acts of its officers are now pending in the Austrian legislature.

In 1896 (Law XXVI) Hungary established an administrative court with jurisdiction over complaints of individuals injured through the acts or decisions of the administrative authorities. By Law XX of 1901 a detailed procedure was provided for. Unlawful administrative measures may be annulled or amended. There is a considerable civil liability for unlawful acts both on the part of the officer and of the political subdivision of the state for which he acts. Law VIII of 1871 with respect to judges and district attorneys, Law XXI of 1886 with respect to municipal officers, and Law XXII of 1886 with respect to communal officers all provide that these officials are civilly responsible for the damages which they cause unlawfully or by incompetence, intentionally or by gross negligence, by act or omission, in their official functions, to the state, municipality, community or to individuals, provided the damage could not have been prevented by an established legal method. The municipalities and the communes are subsidiarily liable in all cases in which the injured person is unable, by reason of the officer's financial incapacity, to obtain damages. The ordinary courts have jurisdiction. The official malfeasance of judges renders the state liable. The civil liability of royal officers is not precisely regulated by statute, but these officers are liable to the state, which may through administrative channels collect damages from the officer. The state alone is liable to private individuals, but it can be sued only in the special cases provided by statute, either before the administrative or the ordinary courts.²

¹ Perlmann in 34 Ztschr. f. d. priv. u. öff. Recht, 109; 24 Arch. f. öff. Recht, 526; Pascaud, *op. cit.*, 24 Rev. Gen. du Dr., 501; Randa, Die Schadenersatzpflicht nach österreichischem Recht, 3rd ed., Wien, 1914; Die angebliche Entschädigungsklage, by Dr. Karl v. Schönberger, 64 Allg. Öst. Gerichts-Ztg. (1913), 185-188, 196-200. Der Rechtsschutz der Einzelnen gegenüber den öffentlichen Organen in Oesterreich, by Carl v. Kissling, 2 Ztschr. f. Gesetzgebung (1876), 225-237. Law of July 12, 1872 in execution of art. 9 of the law of Dec. 21, 1867 on the judicial power, 2 Ann. de Lég. Etr. 353-359.

² Ferdinandy, Gejza v., Staats u. Verwaltungsrecht des Königreichs Ungarn (trans. by H. Schiller), Hannover, 1909, pp. 186, 191, 194; Markus, Desider, Ungarisches

§ 63. Switzerland.

Switzerland, although attributing a wide jurisdiction to its law courts, nevertheless provides a judicial control over acts of the administration by means of administrative courts. The Federal Assembly decides jurisdictional conflicts. Within the administrative jurisdiction are included the following matters: the ordinary civil rights; liberty of conscience and worship; civil status; burial; liberty of trade and industry; coinage; weights and measures; patents; primary instruction; professional licenses and other matters. The Federal Council acts as an administrative court, with right of appeal to the Federal Assembly. The cantons have in general adopted the federal administrative system.¹

The Confederation in its code of obligations provides for contractual and non-contractual liability for acts of officers representing the state as a *fiskus*. Like a private employer, however, the state is relieved from liability for wrongful acts, provided it shows that all precautions were taken to prevent the injurious act. For acts of public power, the law differs in the Confederation and in the cantons, the liability of the state being frequently subsidiary to that of the officer, and enforceable against it only on proof of an unsatisfied judgment against him. By the federal law of Dec. 9, 1850, officers are divided into classes. A direct liability of the state is possible only for acts of officers elected by the Assembly, and not of other officers (arts. 42-43). For many other officers, all responsibility, direct or subsidiary, is denied, although some cantons, as Solothurn, assume such responsibility. The civil liability of officers is also limited; in fact the Swiss law rests largely on the basis that the officer is responsible only to a superior administrative body. Even where civil liability is admitted, this body must first decide that there has been a sufficient private injury.² A proposed federal law amending that of 1850 is now being discussed.

The systems of state liability prevailing in the cantons differ widely.

Verwaltungsrecht, Tübingen, 1912. Laferrière's account (I, 64) is no longer accurate.

¹ Laferrière, I, 66.

² Die Revision des Bundesgesetzes über die Verantwortlichkeit der eidgenössischen Behörden u. Beamten von 9. Dez. 1850, by H. Kaufmann and Carl Ott, 31 *Ztschr. f. schw. Recht* (1912), 601-784.

Some, like Berne, admit liability for fault, suit being possible against state or officer; Solothurn admits only a subsidiary liability, as do some other cantons; in Fribourg, Schaffausen and Thurgau, the state may be sued if the superior administrative authority refuses to declare the officer personally responsible. In some cantons, as in Fribourg, gross fault is necessary before the state can be declared responsible, in exact contrast to the French system. In Vaud, by a law of November 29, 1904, the state and communes assume primary liability for the wrongful acts of officers, reserving a right of recourse against the offending officer.¹

§ 64. Belgium and other Countries.

The administrative systems prevailing in Belgium, the Netherlands, Scandinavia and Greece constitute a different group from those just described. The Belgian system may be taken as the type. It is marked by the absence of administrative tribunals, the judicial courts being competent in litigation of all kinds. The separation of powers between the administration and the courts is maintained by prohibiting the courts from all interference with the administrative power. The only recourse of the individual against unlawful administrative acts for their annulment is before the active administration itself; the ordinary judicial courts are incompetent to annul an illegal act of police or of an administrative authority, although they may refuse to give it effect. The recourse for annulment on account of excess of power, so important a remedy in France, is as unknown to the Belgian law as to the German. The legality of administrative acts thus escapes judicial control, except in so far as their execution or application is demanded.² The regular courts have jurisdiction of all actions for

¹ Pascaud, 24 *Rev. Gen. du Dr.*, 503-504; Ziegler, E., *Die direkte oder subsidiäre Haftung des Staates und der Gemeinden für Versehen und Vergehen ihrer Beamten und Angestellten* in 7 *Ztschr. f. schw. Recht.* (n. f. 1888), 481-562; Vaud, Law of Nov. 29, 1904, *Ann. de Lég. Etr.*, 1904, 301; Geneva, Law of May 23, 1900, *Ann. de Lég. Etr.* 1900, 392. The liability of officers and state in Portugal and Russia is briefly outlined in Pascaud's article, pp. 498 and 501.

² Laferrière, I, 93. A recent work on the responsibility of the state in Egypt discusses in some detail the Belgian, Italian, and other systems. Aba El-Salam Zohny, *La responsabilité de l'Etat égyptien à raison de l'exercice de la puissance publique*, Paris, 1914, 2 v.

damages against the state acting as a *fiskus*, whether contractual or non-contractual. It is otherwise with acts of public power. If legal, or if affected only with defect in form or administrative irregularity, no action lies. But if its illegality results from the violation of individual rights, the state may be sued. The Belgian courts and authors seem to agree that for faults or personal negligence of its officers in the exercise of the public power the state is not responsible. Thus the courts have held that the state, province or commune is not civilly liable for the illegal acts of customs agents, for depredations committed by troops, or for accidents to vessels in ports or on canals as the result of bad service by state officers.¹ Communes are liable for damages done by mob violence.

Administrative officers are not liable to any greater extent than judicial officers, *i. e.*, only for willfully wrongful intent (*dol*), fraud, or gross negligence. Honest mistake relieves the officer of liability. No preliminary authorization is required in order to sue officers, as it is in France and most of the countries which have adopted the French system of administration.²

§ 65. Roumania.

Roumania, in 1866, abolished its Council of State and, as in Belgium, the courts were given an administrative jurisdiction—not, however, to annul administrative acts, for which the active administration was alone competent, but merely to refuse to give them effect if judged illegal. This is only one of many cases in which Roumania has drawn upon the Belgian system for its institutions of public law. By the

¹ Laferrière, I, 95. The last decision is contrary to the French law and it seems even to the Dutch law. 14 *Clunet*, 245; 16 *ibid.* 742.

² Laferrière, I, 96; Pascaud, 24 *Rev. Gen. du Dr.*, 504–505. By way of exception, the Norwegian courts can pass on the legality of an administrative act. Bellom in 35 *Rev. Pol. et Parl.* (1903), 148 citing Ussing, I., *Le contentieux administratif et la juridiction administrative* (trans. by Daresté), Copenhagen, 1902, p. 310. Further, on the Belgian law, see Bourquin, Maurice, *La protection des droits individuels contre les abus de pouvoir de l'autorité administrative en Belgique*, Bruxelles, 1912, p. 92 *et seq.*; Mareq, René, *La responsabilité de la puissance publique*, Paris, 1911, pt. 1, ch. IV; *Etudes sur la responsabilité des administrations publiques*, by C. Beckers, 26 *Rev. de l'Administration* (1879), 137–168; 37 *ibid.* (1890), 92–123; *De la responsabilité de l'état et des communes*, by Edouard Remy, *La Belgique jud.*, 1895, 1410–1459.

law of July 1, 1905, Roumania reestablished an administrative court, by creating a new section of the Court of Cassation which was given power to pass upon acts of authority, to annul them, and in certain cases even, to compel the administration to reform them.¹

§ 66. Comparison of Continental Systems.

Before discussing in detail the Anglo-American system of state responsibility for administrative acts resulting in private damage, we may briefly summarize the salient features of the continental systems of state and official liability. By practically universal rule the state in its character as a *fiskus* or contractor or in the exercise of acts of *gestion* is liable in contract and in tort for the acts of its officers. In some countries, as in Switzerland, the state is relieved by proof of all necessary precautions to avoid the injurious act. When the state acts as a public power the measure of liability varies greatly from state to state. For acts of police, only a limited liability is incurred at best—in France they may be annulled for excess of power or jurisdiction, but pecuniary damages are rarely awarded; all possibility of damages was until recent years even denied. In Germany, the police ordinance must be special and must be judicially declared illegal before an action lies. In Belgium if judged illegal the courts may decline to give it effect.

For private injuries resulting from acts of administration of the public service the rules of liability differ from country to country. If the administrative act is lawful, compensation for injuries requires a special statutory enactment. France and Italy have been held to a large measure of responsibility for illegal or defective operation of the public service, this being limited only by the gross personal fault of the officer, in which event liability is charged to the officer alone. In Germany, liability for the wrongful acts of officers has been assumed by the Empire and several of the more important states. The liability is denied if only negligence is chargeable to the officer, and the injured person might have found relief in other ways than by suit for damages. The state has a right of recourse against the officer. In Spain, only

¹ *Le contentieux des actes administratifs en Roumanie*, by Paul Negulesco, 27 *Rev. Dr. Pub.* (1910), 667-681.

acts of special officers involve the responsibility of the state, but where the law imposes a definite duty upon the state it may be liable for its officer's misfeasance or non-feasance. The officer is liable for the omission of acts, performance of which is demanded of him in writing. In Austria liability is assumed by the central government only for wrongful acts of judicial officers, a constitutional provision for general liability for acts of administrative officers never having been carried into effect. In Hungary, as well as in Argentine,¹ local subdivisions of the government have assumed a large measure of responsibility for the wrongful acts of administrative officers, although, as in some of the cantons of Switzerland, liability is subsidiary to that of the officer and depends upon the production of an unsatisfied judgment against him. The central government, as in Austria, is liable for judicial misfeasance, and for acts of administrative officers, where provided for by statute. In Belgium, the freedom of the administration from judicial control, has also limited the liability of the state, except where admitted by special statute, to acts of private *gestion*. Officers, however, are liable for gross faults. Finally, the principles of liability on the continent extend with slight modifications to all political subdivisions of the state—communes, districts, departments, etc., in contradistinction to the Anglo-American principle which subjects municipal corporations to rules quite different from those governing the central government, state or federal.

ANGLO-AMERICAN SYSTEM

§ 67. Judicial Control over Acts of Administration.

In the United States and Great Britain the judicial control over administrative acts is exceedingly great, in direct contrast to the rule prevailing in France and in the other countries having a similar administrative system. This control is exercised in various ways: first, acts of officers done under color of office but not in accordance with law are justiciable in the ordinary courts. The officer either abusing his powers or acting without jurisdiction, may incur a civil or criminal liability, under limitations to be discussed hereafter. Again, the orders of administrative authorities, if contrary to law, may be enjoined, or

¹ Lopez, L., *Derecho adm. argentino*, Buenos Aires, 1902, pp. 215 *et seq.*

if the authorities fail to carry out a duty to individuals which the law imposes, mandamus will issue. The violation of an administrative order, again, may involve a penalty. In the enforcement of the penalty before the courts, the latter will pass upon the legality of the administrative order.¹ The courts will not interfere with the use of discretionary powers invested in administrative authorities by the law, but only with their abuse, *e. g.*, failure to grant a hearing or notice, and similar violations of private right. The remedy before the harmful act has been committed is generally against the threatened act by petition for injunction, or if unfair or illegal, by request that it be reviewed and annulled or amended. After commission of the act, the remedy is an action for damages against the officer, within limitations to be noticed, or against the state or public corporation, in so far as suit is permitted.

§ 68. Suit for Pecuniary Damages—Liability of Municipal Corporations.

On principle, suits against the central government cannot be brought in England or the United States, without the consent of the government. This permission is in general limited to suits on contract, and excludes liability for the tortious acts of officers. One reason for this immunity lies partly in the fact that the decentralized system of administration throws a large share of the exercise of public powers upon political subdivisions of the state and local bodies and corporations, which are held to a considerable measure of liability, analogous in many respects to that of the state in continental Europe. In the United States, it is only in the case of municipal corporations that the distinction of governmental and private or corporate functions, as a criterion of liability, has been adopted. So, for example, American cities engaged in carrying on gas works, water works, the ownership and management of wharves and the towing of vessels for profit, have been held to respond in damages for the wrongful acts of their officers, agents, or servants, provided these wrongdoers acted within

¹ Goodnow, *op. cit.*, II, 144, 190 *et seq.* The federal courts in the United States have a very limited administrative jurisdiction, the remedy being practically limited to appeal. Goodnow, II, 210. See also T. R. Powell, Administrative exercise of the police power, 24 Harvard L. R. (1911), 268-289, 333-346, 441-459, particularly 338, 441 *et seq.*

the scope of their apparent authority, or their misconduct was ratified by the municipality.¹

On the other hand, a municipal corporation has been held not liable for the torts of its fire or police departments, nor for those of its board of health (except in special cases, by statute) or of education, nor for those of any other officers or agents in the discharge of functions which are primarily governmental and incumbent upon the state, but the performance of which it has delegated to the municipality. Neglect of officers in guarding prisoners, or in caring for jurymen, or in keeping jails or other public buildings or highways in repair will not subject the corporation to legal liability.² Injuries to private property under the valid exercise of the police power give the individual owner no redress against city, state or officer. As a matter of fact, the line of distinction between governmental and corporate functions is often exceedingly vague. Tests which have been applied to determine the governmental character of the act of administration are: that the duty is enjoined upon the city by law; that the service is performed for the general public; and that the city, in its corporate capacity, receives no special benefit from the act.³

Municipal corporations are now by state statute compelled to assume liability for numerous acts inflicting damage upon private individuals which by common law involve no responsibility. Thus, damage to private property in the construction of public works, damage by the action of health officers, the destruction of property by mobs, among other matters, is compensated for by numerous municipal corporations.⁴

A distinction is made in the United States between municipal cor-

¹ Burdick, F. M., *The law of torts*, 2nd ed., Albany, 1908, p. 108; Goodnow, F. J., *Municipal home rule*, New York, 1906, ch. VII, VIII; Dillon, J. F., *Commentaries on the law of municipal corporations*, Boston, 1911, vol. IV, ch. 32, § 1610 *et seq.*, Bonnard, *op. cit.*, 136 *et seq.*

² Burdick, *op. cit.*, 42, 110; Powell, 24 *Harvard L. R.* 441. See the leading case of *Hill v. Boston*, 122 *Mass.* 344.

³ See the well-reasoned opinion in *Evans v. City of Sheboygan* (Wisconsin, 1913), 141 *N. W. Rep.* 265.

⁴ Dillon, *op. cit.*, IV, §§ 1636-1637.

porations and what are known as quasi-corporations—townships, counties, school districts, etc.—according to which suits in tort, except when permitted by express statute, may not be brought against the latter, inasmuch as they are considered agents of the central government for greater convenience in administration, and share the immunity from liability for tort which is enjoyed by the state.¹

§ 69. Principle of State Immunity from Pecuniary Liability.

It has been observed that on principle the central government in English and American law is immune from liability, except in the limited measure defined by statute. This principle of non-liability has been explained on various grounds—based on history, fiction, convenience, and expediency. The best-known of these grounds are that the King can do no wrong, which declaration was applied to the sovereign and state;² that the King cannot issue a writ to himself;³ that there is an inconsistency in the idea of supreme executive power and subjection to suit;⁴ that a state or nation would suffer an indignity in being compelled to submit to a judgment and execution;⁵ that it would embarrass the state in the performance of its duties, to subject it to suit at the will of individuals, and to submit the control of its instruments and means of carrying on the government, and its money and other property, to judicial tribunals;⁶ that states should not be coerced to pay debts which for various reasons they might not be willing or conveniently able to pay.⁷

In view of this limited jurisdiction of courts over suits against the state, and the wide liability of officers with the resulting frequency

¹ Dillon, *op. cit.*, IV, § 1638 *et seq.*; Burdick, *op. cit.*, 106; Goodnow, *Comparative administrative law*, II, 152.

² Goodnow, *op. cit.*, II, 154; Bonnard, *op. cit.*, 31, 75 *et seq.*

³ *U. S. v. Lee*, 106 U. S. 196, 206.

⁴ Gray, J., in *Briggs v. Light Boats*, 11 Allen, 157 quoted in *U. S. v. Lee*, 106 U. S. 206.

⁵ John Marshall in the Virginia Convention, 3 Elliott's Debates, quoted in *Hans v. Louisiana*, 134 U. S. 1; also Matthews, J., *In re Ayers*, 123 U. S. 443.

⁶ *U. S. v. Lee*, 106 U. S. 196, 206.

⁷ Marshall, C. J., in *Cohens v. Virginia*, 6 Wheat. 264, 406, thus suggests the reason for the adoption of the eleventh amendment. See W. Trickett in 41 *Amer. L. Rev.*, 364-365.

of suit against officers as organs of state activity, it becomes important to determine when a suit against an officer is in reality a suit against the state, and within its protective immunity. In Great Britain those who actually are agents and instruments of the Crown in its governmental activities are shielded by the Crown from liability. The distribution of governmental functions in England among incorporated local administrative boards and government departments, such as health boards, commissioners of works, dock and bridge trustees, etc., enables an injured individual to have recourse against the corporation in cases where he would have no action against the Crown. A distinction seems, nevertheless, to be drawn between these incorporated bodies in fulfilling public functions as a substitute for private enterprise and as a branch of general governmental administration. For the wrongful acts of its employees in the former capacity, the corporation is liable, but not in the latter case.¹

In the United States it has often been difficult to distinguish a suit against an officer from a suit against the state in the name of an officer. The general rule now is that where the adverse interest is in the state, against whom alone relief is asked and judgment will effectively operate, the action is against the state, and, under the prohibition of the eleventh amendment, not within the jurisdiction of the federal courts.² The narrow view expressed in *Osborn v. The Bank*,³ that a state is not sued unless a party to the record has been definitely rejected. However, it is clear that the mere fact of being a state officer acting to benefit the state should not be enough to shield all

¹ The English cases and principles of law are discussed in an admirable article on "Liability for acts of public servants", by W. Harrison Moore in 23 *Law Quar. Rev.* (1907), 12-27. See also article by same author, *Misfeasance and non-feasance in the liability of public authorities*, 30 *Law Quar. Rev.* (1914), 276-291, 415-432; Bonnard, *op. cit.*, 54 *et seq.* See particularly the following cases: *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93; *Gilbert v. Corporation of Trinity House* (1886), 17 Q. B. D. 795; *Gibraltar Sanitary Commissioners v. Orfila*, 15 App. Ca. 400; *Kinloch v. Sec'y of State for India* (1880), 15 Ch. Div. 1; *Bainbridge v. Postmaster-General* (1906), 1 K. B. 178.

² *In re Ayers* (1887), 123 U. S. 443; *Fitts v. McGhee* (1899), 172 U. S. 516; *Hopkins v. Clemson College* (1910), 221 U. S. 636. See the tests for distinguishing a suit against an officer from one against the state in *Poindexter v. Greenhow* (1884), 114 U. S. 270.

³ *Osborn v. U. S. Bank* (1824), 9 Wheat. 738 per Marshall, C. J.

illegal acts under a doctrine of immunity from suit. The exact limits of the doctrine cannot be stated in any broad principle, but may be expressed by a number of narrow rules, applicable to special classes of cases. For example, an action against a state officer, whose object is to compel a specific performance of the state's contract, is a suit against the state.¹ In property cases, a suit against an officer to obtain possession of property in which the state has title and possession,² or to compel him to pay money out of the state treasury,³ or to prevent the state from using its own property⁴ is a suit against the state. In general, the performance of ministerial duties by a public officer may be enforced by mandamus, and this is not regarded as a suit against the state. Officers who are clothed with some duty in regard to the enforcement of an unconstitutional statute may be enjoined, and the suit will be regarded as one against the state only where the officer acts as a representative of the state without any connection with the enforcement of the statute.⁵

¹ *Hagood v. Southern* (1886), 117 U. S. 52; *North Carolina v. Temple* (1890), 134 U. S. 22; *Louisiana v. Jumel* (1882), 107 U. S. 711; *In re Ayers* (1887), 123 U. S. 443.

² *Cunningham v. Macon*, etc. (1883), 109 U. S. 446; *Christian v. N. C. Railroad* (1890), 133 U. S. 233. In the *Cunningham* case, Justice Miller classified at length the cases in which a suit against an officer was held to be a suit against the state.

³ *Louisiana v. Jumel* (1882), 107 U. S. 711; *Smith v. Reeves* (1899), 178 U. S. 436.

⁴ *Belknap v. Schild* (1895), 161 U. S. 10.

⁵ *Ex parte Young* (1907), 209 U. S. 123, 154; *Smyth v. Ames* (1898), 169 U. S. 466; *Prout v. Starr* (1903), 188 U. S. 537; *Gunter v. Southern*, 200 U. S. 543, 559; *Mississippi v. Illinois*, 203 U. S. 335, 340; *cf. Fitts v. McGhee*, 172 U. S. 516; *Reagan v. Trust Co.*, 154 U. S. 362. A valuable note as to when public officers are subject to suit although they assume to be acting for a state or the United States is appended to the report of the case of *Sanders v. Saxton* (New York, Oct. 1905), in 108 *Amer. State Rep.* 826, 830-844.

Valuable discussions, more or less exhaustive, of the cases and the distinctions between suits against states and officers are contained in a book by Singewald, Karl. The doctrine of non-suability of the state in the United States, Baltimore, 1910, and in the following articles: The eleventh amendment and the non-suability of the state, by A. F. Wintersteen, 30 *Amer. Law Reg.* (1891), 1-15; Suability of states by individuals in the courts of the United States, by Jacob Trieber, 41 *Amer. Law Rev.* (1907), 845-869; Suits against states by individuals in the federal courts, by William Trickett, 41 *Amer. Law Rev.* (1907), 364-383; The eleventh amendment, by Herbert S. Hadley, 66 *Cent. Law Jour.* (1908), 71-76. See also note in 7 *Columbia Law Rev.* (1907), 609-611.

§ 70. Limited Right of Action Granted by Statute.

In connection with the pecuniary liability of the state, we have already adverted to the limitation of responsibility in Anglo-American law. Beginning with the maxim that the King can do no wrong, which was received in the United States as applying to the state, a limited right of action has been gradually extended covering specific cases. The most important limitation of the right to sue the Crown or state is the principle that no action sounding in tort may be brought. This non-responsibility for tort has been explained on the ground that the state acts only through officers and that the tortious act of the officer is not the act of the government, which can neither commit nor authorize a wrong. This antiquated plea of *ultra vires* and other reasons for an immunity of the state from liability for tort have long been abandoned by the legislation, courts and jurists of Europe, and might well, with consequent enhancement of justice, be abandoned in Anglo-American law.

In England, the individual addresses himself to the grace of the King by suing out a Petition of Right which, when granted, opens the right to suit against the Crown as against any ordinary defendant. By statute, however, the right is also given to sue various Government Departments directly.¹ In an opinion very similar to that of the French Tribunal of Conflicts in the Blanco case in 1873 it was said by Lord Cottenham in *Monekton v. A-G.* (1850), 2 Mac. & G. 402, 412: "The proceeding by petition of right exists only for the purpose of reconciling the dignity of the Crown and the rights of the subject, and to protect the latter against any injury arising from the acts of the former." The practice of suit by petition of right extends back to Edward III, and perhaps to Magna Charta, but its present use is regulated by the Petitions of Right Act 1860, 23 and 24 Vict., c. 34.² Originally confined to suits for the recovery of specific prop-

¹ Robertson, Geo. S., *The law and practice of civil proceedings by and against the Crown*, London, 1908, Book I.

² For the history of the Petition of Right see Anstey, T. Chisholme, *Letter to the Right Hon. The Lord Cottenham . . . as to the law and practice of petition of right*, London, 1845; Clode, Walter, *The law and practice of petition of right*, London, 1887, p. 6 *et seq.* See also W. Harrison Moore, *The Crown as a corporation*, 20 Law Quar. Rev. (1904), 351-362.

erty, it may now be defined as the process by which recovery is made from the Crown of property of any kind, including money, to which the suppliant is legally or equitably entitled, except in cases where this process is ousted by some statutory mode of recovery.¹ The petition lies where land, goods or money have found their way into the possession of the Crown, and restitution is asked, or, in lieu thereof, compensation in money; or where the claim arises out of contract or for goods supplied to a branch of the government.² The petition must rest on a recognized basis of legal or equitable relief, and must not be addressed to the mercy or good nature of the Sovereign. If the petition is granted, by the endorsement upon it of the fiat: "Soit droit fait aux parties," the action proceeds in the regular courts having jurisdiction of a similar action between subject and subject.³ The petition has been held to lie for the recovery of lands, of incorporeal hereditaments, *e. g.*, rent, of chattels real, of specific chattels or their value, of money claims in general not founded on tort, of liquidated sums due under contracts, of payment for services rendered, of unliquidated damages for breach of contract, of duties overpaid, of compensation under special statutes and other cases. Where the petition presents a case of mixed contract and tort, the fiat is usually granted to secure a decision whether the claim is really founded in contract or in tort or is severable. The petition will not lie where the claim is not founded in law or equity (as this term is understood in its technical sense in English law), nor where the claim sounds in tort, nor where it is brought for infringement of a patent,⁴ for pensions to military, naval or civil officers of the Crown, nor for the distribution of an award received by the Crown from a foreign government for the benefit of its subjects.⁵ In this last re-

¹ Robertson, *op. cit.*, 331. See definition of "relief" under § 16 of the Petition of Right Act, 1860.

² Feather *v.* The Queen (1865), 6 B. & S. 257, 294.

³ The practice is fully discussed in the works of Robertson and Clode, *supra*.

⁴ This has been altered by § 29 of the Patent and Designs Act, 1907, 7 Ed. VII, 29, by which the Crown is made liable as is a subject for patent infringements. The development in the United States has been the same; up to 1910, the United States was not suable for patent infringement.

⁵ The cases in support of this classification are noted in Robertson, *op. cit.*, 330 *et seq.*, and in Clode, *op. cit.*

spect, the practice of France and the United States is in harmony, and throughout it will be seen how closely in accord with English practice is that of the United States. The various British colonies have enacted statutes rendering the government, under definite limitations, subject to suit—some of them, like Canada (39 Vict., c. 27), adopting a rule of liability very similar to that of Great Britain, others granting more extended rights to the subject, as, *e. g.*, some of the provinces of Australia, and others still, restricting the right to contract claims purely, as, *e. g.*, Newfoundland (27 Vict., c. 8).¹ There seems now to be little doubt that aliens can sue as well as subjects.²

In the United States, where the power to pay debts of the government has been held to reside in the legislature, it was only by a gradual process that a limited right of judicial relief against the state has been granted by statute. The fact that such permission to sue is a matter of grace finds expression in numerous limitations on the right of the claimant, and in various privileges granted to the government. For example, the jurisdiction of the Court of Claims, established in 1855, even though extended by several acts, particularly the Tucker Act of March 3, 1887 (24 Stat. L. 505), is limited to a few specific cases, and practically excludes all right of action for tort injuries. The government, moreover, always has the right of appeal, the individual in specified cases only. Where the claimant practices fraud in the statement, proof, establishment or allowance of his claim, the whole claim is forfeited.³

Besides the legislative relief of claimants of certain kinds through Congressional standing committees, such as those on War Claims, Private Land Claims, and others, numerous classes of claims have by special statute, such as the French Spoliations Act, Indian Depredations Act and others, or by general act, such as the Tucker Act of 1887, been referred to the Court of Claims.⁴ Moreover, under the Bowman

¹ The colonial statutes are set out in Appendix B of Clode, *op. cit.*

² House Rep. 134, 43rd Cong., 2nd sess., p. 193 (Lawrence's Report on Law of claims against governments, 1875); Robertson, *op. cit.*, 364.

³ R. S., § 1086.

⁴ The history of the court of claims and its jurisdiction is discussed in an article by Judge Richardson in 7 Southern Law Rev. (1882), 781-811, also printed in volume 17, Court of Claims reports, and reprinted separately; in a valuable article by Ernst

Act of March 3, 1883 (22 Stat. L. 485), Congress or the head of an Executive Department may refer claims to the Court for the investigation and determination of facts, without entering final judgment. Among the states, many have established tribunals or boards to hear claims and report their findings to the legislature, while some give entire jurisdiction over claims to committees of the legislature. In only a few states is there a constitutional prohibition denying the suability of the state. The measure of liability assumed by the states follows somewhat that adopted by the federal government.

Aliens may sue in the Court of Claims on claims within the jurisdiction of the Court, provided their own government permits itself similarly to be sued by citizens of the United States. It has been judicially determined that this right is accorded to citizens of Prussia, Hanover, Bavaria, Switzerland, Holland, Spain, Belgium, Italy, Great Britain and a few other countries. Inasmuch as practically all governments permit themselves to be sued, and most of them in a far wider range of cases than those within the jurisdiction of the Court of Claims, this provision for reciprocity hardly acts as a limitation on the right to sue.¹

Under the Tucker Act, which in certain cases confers concurrent jurisdiction on the lower federal courts, the Court of Claims received its widest range of general jurisdiction. That act grants the Court jurisdiction on (1) all claims founded upon the Constitution of the United States or any law of Congress, except for pensions; (2) upon any regulation of an Executive Department; (3) upon any contract, express or implied, with the Government of the United States; or (4) upon claims for damages, liquidated or unliquidated, in cases not

Freund, Private claims against the state, 8 Pol. Sc. Quar., 625-652; in two articles by C. C. Binney, Origin and development of legal recourse against the U. S., 57 Amer. Law Reg., 372-395 and Element of tort as affecting the legal liability of the U. S., 20 Yale Law Journ., 95-110; in an article by Judge Atkinson, The United States Court of Claims, 46 Amer. Law Rev., 227-240. The jurisdiction of the Court is exhaustively reviewed by Justice Harlan in *U. S. v. New York*, 160 U. S. 598. The provisions relating to the Court are now found in the Judicial Code, 36 Stat. L. 1135 *et seq.*

¹ R. S., § 1068. See the numerous cases in which judicial determinations have been made of the right of citizens of certain foreign countries to sue in 2 Fed. Stat. Ann. 65 and *Fichera v. U. S.*, 9 Ct. Cl. 254; see also *Brown v. U. S.*, 6 Ct. Cl. 171.

sounding in tort. The exception of tort claims acts as the greatest single limitation upon the jurisdiction of the court, but it seems now to be fairly certain that it does not affect a claim under subdivisions (1) and (2), *i. e.*, founded on the Constitution, a law of Congress, or Executive regulation, notwithstanding its tortious origin.¹ Congress may under the Bowman Act and by special statute refer tort cases to the Court of Claims, as it has, for example, in the numerous cases of collision between private vessels and government vessels which have been so referred,² or may itself allow tort claims. When Congress waives the government's immunity from suit, the waiver is strictly construed and will in the absence of clear evidence of a contrary intention be held to waive only well-known special defenses, *e. g.*, the statute of limitations, and not such a general defense as the tortious nature of the claim or its origin in an unauthorized wrong of an officer.³ Congress alone, and not an officer of the United States, can waive the privilege of the government not to be sued.⁴

On principle, the United States government is not liable for the negligence, misfeasance or non-feasance of its officers,⁵ even though

¹ *Dooley v. U. S.*, 182 U. S. 222; *Basso v. U. S.*, 40 Ct. Cl. 202; *Christie-Street Commission Co. v. U. S.*, 136 Fed. 326. See an instructive article by C. C. Binney, Element of tort as affecting the legal liability of the U. S., 20 *Yale Law Journ.*, 95-110.

² In England, in such cases, the government undertakes the defense of the naval officer who may be sued for this tort, and pays any judgment found against him. On the Continent, regular judicial remedies are provided in the ordinary courts or in administrative courts for cases in which vessels owned by individuals have suffered damage by collision with public vessels. A federal bill to permit suit against the U. S. government in all such cases has not yet become a law; see Argument in support of Bill S. 7627 (later H. R. 64, Sen. 1662, 63rd Cong., 1st sess.) permitting suits against the U. S. for damages by vessels owned or operated by the U. S.—Amendments to admiralty law, Senate Hearings, 1910, p. 11.

A gratuitous subsidiary liability is recognized for certain claims, as, *e. g.*, the Indian Depredation Claims according to the Act of 1891. *Leighton v. U. S.*, 161 U. S. 291; *Woolverton v. U. S.*, 29 Ct. Cl. 107; *Love v. U. S.*, 29 Ct. Cl. 332; *Pino v. U. S.*, 38 Ct. Cl. 64; *Labadie v. U. S.*, 32 Ct. Cl. 368.

³ *Dahlgren v. U. S.*, 16 Ct. Cl. 30; *U. S. v. Irwin*, 127 U. S. 125; *Haskell v. U. S.*, 9 Ct. Cl. 410; *U. S. v. Cumming*, 130 U. S. 452.

⁴ *Carr v. U. S.*, 98 U. S. 433.

⁵ *German Bank v. U. S.*, 148 U. S. 573, particularly 579; *Moffat v. U. S.*, 112 U. S. 24; *Whiteside v. U. S.*, 93 U. S. 247; *Hart v. U. S.*, 95 U. S. 316; *Langford v. U. S.*, 101 U. S. 341 and numerous other cases. See also *Bark Eliza* (opinion of Cushing, Atty. Gen.), 7 Op. At. Gen. 229, 237.

in the discharge of their official duties.¹ Nor can an officer by unauthorized acts fix any liability on the United States, although it may have been beneficial to the government or done in its interest.² Where the government derives a financial benefit, at the expense of an individual, from the unauthorized act of an officer, it usually makes provision for the payment by the Treasury of any judgment against the officer³ or permits a suit on implied contract.⁴ The remedy for injuries occasioned by the negligence or misfeasance or non-feasance of officers is by appeal to Congress.⁵

While the phrase "not sounding in tort" prevents a claimant from waiving a tort and suing *ex contractu*, even in a case where he could have done so at common law,⁶ there is great difficulty in drawing a clear line between claims disallowed on the ground of tort, and those allowed on implied contract. Some of the cases in which jurisdiction has been declined on the ground of tort are the following: failure to remove the wreck of a government vessel;⁷ faulty construction of a dam;⁸ failure to put proper light on pier;⁹ wrongful diversion of

¹ Langford v. U. S., 101 U. S. 341; Belknap v. Schild, 161 U. S. 10; Morgan v. U. S., 14 Wall. 531; Hill v. U. S., 149 U. S. 593. See Story on Agency, 8th ed., 412.

² Filor v. U. S., 9 Wall. 45; Gibbons v. U. S., 8 Wall. 269. In most of the countries of Europe, as we have seen, the government is liable for the wrongful acts of officers in the discharge of their official duties, and the government is nearly always liable where the act of the officer has benefited it.

³ The government, for example, by statute pays judgments against customs collectors for excess duties unlawfully levied. See also Mechem, Public offices and officers, Chicago, 1890, § 879.

⁴ State Nat. Bank v. U. S., 24 Ct. Cl. 488; cf. Knot v. U. S., 95 U. S. 149; U. S. v. Great Falls Mfg. Co., 112 U. S. 645; U. S. v. Bank, 96 U. S. 30.

In the case of Knot v. U. S. it was said: "To constitute an implied contract with the U. S. there must have been some consideration moving to the U. S.; or they must have received the money, charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake."

⁵ German Bank v. U. S., 148 U. S. 573; Dooley v. U. S., 182 U. S. 222.

⁶ McArthur v. U. S., 29 Ct. Cl. 194. So claim for property unlawfully taken cannot be converted into one of implied contract by suing for the use of the property. Ribas v. U. S., 194 U. S. 315.

⁷ McArthur v. U. S., 29 Ct. Cl. 191.

⁸ Hayward v. U. S., 30 Ct. Cl. 219.

⁹ Walton v. U. S., 24 Ct. Cl. 372.

watercourse;¹ collision of government vessel with a private vessel;² wrongful diversion of proceeds of lands;³ illegal arrest and imprisonment;⁴ or taking of property from an arrested person by the arresting officer;⁵ an injury to an employee of the government in official work;⁶ seizure of private vessel by military forces in the prosecution of a war;⁷ or compelling a master to proceed to sea with resulting injury to his vessel.⁸

Until the Act of June 25, 1910 (36 Stat. L. 851) made the government liable to reasonable compensation for the unauthorized use of a patent, a peculiar line of decisions left much doubt upon the responsibility of the government for such use.⁹ Where the claim was brought for infringement, it was dismissed for lack of jurisdiction on the ground of tort,¹⁰ nor could the officer using the patent be used.¹¹ Where, however, instead of denying the private right, as in the above cases, the government recognized the patentee's right, expressly or by implication, a recovery on implied contract was allowed.¹² The same criterion has been applied generally to property wrongfully held by government officers. If the government alleges title in itself, it is a tort in case title proves to be in the private individual, and there is no jurisdiction;¹³ otherwise, if the private title is recognized.

Some difficulty has arisen as to what is a "taking" of property for public use within the principle of constitutional liability for eminent

¹ *Mills v. U. S.*, 46 Fed. 738

² *Dennis v. U. S.*, 2 Ct. Cl. 210.

³ *Milwaukee v. U. S.*, 1 Ct. Cl. 187.

⁴ *Spicer v. U. S.*, 1 Ct. Cl. 316.

⁵ *Mann v. U. S.*, 32 Ct. Cl. 580.

⁶ *Hayes' case*, 46 Ct. Cl. 282.

⁷ *Herrera Nephews' Case*, 43 Ct. Cl. 430; *Plant Investment Co. Case*, 45 Ct. Cl. 374.

⁸ *Morgan v. U. S.*, 14 Wall. 531.

⁹ See article by C. C. Binney, *The government's liability for the use of patented inventions*, 52 *Amer. Law Reg.* (1904), 22-53. The Patent Act of Austria, France, and Germany provides that government is liable for use of private patent.

¹⁰ *Schillinger v. U. S.* (1894), 155 U. S. 163; *Russell v. U. S.* (1901), 182 U. S. 516; *Sullivan et al v. U. S.*, 23 Ct. Cl. 477.

¹¹ *Belknap v. Schild* (1895), 161 U. S. 10.

¹² *U. S. v. Palmer* (1888), 128 U. S. 262; *U. S. v. Berdan Firearms Co.* (1894), 156 U. S. 552; *Bethlehem Steel Co. v. U. S.*, 42 Ct. Cl. 365.

¹³ *Langford v. U. S.*, 101 U. S. 341; *U. S. v. Lynah*, 188 U. S. 445.

domain. Thus, the overflow of private land rendering it worthless, in the exercise of the power to regulate commerce and improve the navigability of a river, done under authority of Congress, was held a sufficient taking to warrant recovery;¹ whereas the injury to and destruction of agricultural lands on the bank in improving the navigation of the Mississippi river² and the raising of the river level in improving navigation, thereby preventing an adjoining owner from draining his canals into the river³ were held to be consequential damages and not to constitute a "taking" of private property. Even before the Tucker Act, a claim for the taking of property under eminent domain was held to arise *ex contractu* and not *ex delicto*.⁴ Negligence of officers doing injury to property in carrying out authorized government operations will not, in the absence of a "taking" of such property, warrant a recovery.⁵

The following have been held to be claims on implied contract: impressment of wagon-train or other private property by military officer in an emergency;⁶ misappropriation of gold certificates presented to proper officer for redemption, but applied by him to make up his own indebtedness to the government;⁷ unlawful eviction of a tenant under lease;⁸ a grant by Congress of moneys as a gratuity.⁹ But there is no implied contract to pay for merely voluntary service to the government,¹⁰ although there is, if rendered in expectation of compensation and Congress refers the claim.¹¹ Nor is there any liabil-

¹ *U. S. v. Lynah*, 188 U. S. 445; *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

² *Jackson v. U. S.*, 47 Ct. Cl. 579, 230 U. S. 1 (June 16, 1913) and *Hughes v. U. S.*, 230 U. S. 24 (June 16, 1913); *cf. Bedford v. U. S.*, 192 U. S. 217, 225; *U. S. v. Chandler-Dunbar Co.*, 229 U. S. 53 (May 16, 1913).

³ *Mills v. U. S.*, 46 Fed. 738.

⁴ *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645.

⁵ 12 Dec. Comp. of the Treasury, 580, 582. Payment of Malambo fire claims in Panama, Sen. Doc. 858, 61st Cong., 3rd sess., pp. 2, 4.

⁶ *Mason v. U. S.*, 14 Ct. Cl. 59; *U. S. v. Russel*, 13 Wall. 623.

⁷ *State Nat. Bank v. U. S.*, 24 Ct. Cl. 488.

⁸ *Dunbar v. U. S.*, 22 Ct. Cl. 109.

⁹ *Mumford v. U. S.*, 31 Ct. Cl. 210.

¹⁰ *Boston v. District of Columbia*, 19 Ct. Cl. 31.

¹¹ *Roberts v. U. S.*, 92 U. S. 41. In England and Canada, there seems little doubt that a petition of right lies for services rendered; see cases cited in *Robertson, op. cit.*, 338.

ity on implied contract for moneys illegally received by consuls,¹ nor for property captured from a public enemy, which had previously belonged to a loyal private citizen and been unlawfully confiscated;² nor is there any implied contract to make good the losses of an individual from the wrongful acts of officers,³ except in the cases of authorized appropriation of property above mentioned.

When the government enters into a contract with an individual or corporation it divests itself of its sovereign character so far as concerns the particular transaction and assumes that of an ordinary citizen.⁴ In contractual relations, we find the most frequent waivers of the state's immunity from suit. It becomes subject to the rules of private law in the interpretation of the obligations under the contract, with the exception of the ordinary rules of agency. The officer contracting in the name of the government stands in a somewhat different legal relation to it than the ordinary agent to his principal. So, for example, while the private agent binds the principal to the extent of his apparent and ostensible authority, every one dealing with government officers is bound by their actual authority, and by every requirement of form, even by the amount of appropriations, which may limit the power to incur obligations.⁵ Thus it is clear that the unauthorized act of an officer does not bind the government unless it is subsequently ratified,⁶ although his authority may be implied

¹ *The Bark Serene*, 6 Op. Atty. Gen. 617 (Cushing).

² *Fawcett v. U. S.*, 25 Ct. Cl. 178.

³ *Langford v. U. S.*, 101 U. S. 341.

⁴ *U. S. v. N. A. C. Co.*, 74 Fed. 145, 151; *So. Pac. v. U. S.*, 28 Ct. Cl. 77; *Cook v. U. S.*, 91 U. S. 398; *Purcell Envelope Co. v. U. S.*, 47 Ct. Cl. 1, 24. See the following articles: Government contracts, 4 Amer. Law Rev., 1-17; Government contracts, by C. F. Carusi, 43 Amer. Law Rev. (1909), 1-28, and 161-191; cf. Perriquet, E., *Contrats de l'état et travaux publics*, 2nd ed., Paris, 1890; *Der Staat als Kontrahent*, by G. Grosch, 5 Jahrbuch des öff. Rechts (1911), 267-284 (emphasizing treaty relations), and Navarra, P. G., *Lo stato nei contratti con persone private*, Turin, 1911.

⁵ *Pierce v. U. S.*, 1 Ct. Cl. 270; *R. S.*, § 3679; *Shipman v. U. S.*, 18 Ct. Cl. 138; *Dunwoody v. U. S.*, 143 U. S. 578; *Hawkins v. U. S.*, 96 U. S. 689; *Sprague v. U. S.*, 37 Ct. Cl. 447; *Hume v. U. S.*, 132 U. S. 406; *Neilson v. Lagow*, 12 Howard, 98.

⁶ *Whiteside v. U. S.*, 12 Ct. Cl. 10, 93 U. S. 247; *Reese v. U. S.*, 2 Ct. Cl. 1, 7 Ct. Cl. 82; *Pierce v. U. S.*, 7 Wall. 666; *Hooe v. U. S.*, 218 U. S. 322, 336; *Filor v. U. S.*, 9 Wall. 45; *U. S. v. Speed*, 8 Wall. 77.

from the language of the statute under which he acts.¹ His authority must be proved, where the allegations of the petition are traversed,² although a contractor may assume that an authorized discretion has been properly exercised.³ There is a presumption against the officer's incurring any personal liability on account of a public contract concluded by him.⁴

The obligations of contractors have occasionally been increased or materially altered by a subsequent general statute. This has been held by the Court of Claims not to involve any liability on the part of the government, it being considered that the United States when sued as a business fiskus entering into contracts cannot be made liable for acts of legislation, enacted in its character as a sovereign:

"Whatever acts the government may do, be they legislative or executive, so long as they be public and general, can not be deemed to alter, modify, obstruct or violate the particular contracts into which it enters with private persons."⁵

This is in marked contrast to the rule prevailing in France, where liability of the state is incurred for such indirect violation of the terms of government contracts.⁶

LIABILITY OF OFFICERS—COMPARATIVE LAW

§ 71. Right to Sue Officer. The Method of Protecting Officer.

We have adverted at various places to the responsibility of officers for their torts. In many states, as has been observed, the officer is held personally responsible for his tort, *e. g.*, in the United States and Great Britain, in Portugal, in Greece, in Zurich, in Brazil, in Argentine, and in other countries, the state itself being on principle immune from

¹ *Rives v. U. S.*, 28 Ct. Cl. 249.

² *Calkins v. U. S.*, 1 Ct. Cl. 382.

³ *Thompson v. U. S.*, 9 Ct. Cl. 187.

⁴ *Hodgson v. Dexter*, 1 Cranch, 345; *Parks v. Ross*, 11 Howard, 362.

⁵ *Deming v. U. S.*, 1 Ct. Cl. (1865), 190; *Jones and Brown v. U. S.*, 1 Ct. Cl. (1865), 384; *Wilson v. U. S.*, 11 Ct. Cl. (1875), 513. See also *supra*, p. 128, note 3.

⁶ The injury must, however, be direct and material, and not merely consequential and speculative. See article *Des rapports entre les pouvoirs de police et les pouvoirs de gestion dans les situations contractuelles* by Henri Ripert, 22 Rev. Dr. Pub. (1905), 1 *et seq.*, also *supra*, p. 127.

liability. In these states no administrative consent to sue the officer is necessary, and in Belgium and Austria, it is no longer required.

In Spain, France, Germany, Italy and some of the cantons of Switzerland, the administrative system rests on the principle of the Roman law that the officer is not suable at the will of every person, but that he is responsible to the superior administrative body under whose authority he acts. These states have practically all borrowed the French system under article 75 of the constitution of the year VIII, which required that the Council of State give its consent before the officer could be sued. This operates not only as a protection to administrative officers but also insures the independence of the administration. In Germany, however, this preliminary question is decided by a body, judicial in character and independent of the administration. Where the officer is suable, the ordinary judicial courts generally have jurisdiction. Some system of limitation upon the right of suit still exists in the countries above mentioned. In France, instead of a preliminary administrative consent to suit, the plaintiff who brings a vexatious action against an officer is subject to penalty, which acts as a sufficient restriction upon unwarrantable actions. The administration in countries possessing the French system of administrative courts may still raise the conflict if it believes that an act of administration will be called into question before the ordinary courts through the action against the officer.¹ In various countries of Latin-America responsibility is often thrown upon the officer in order to shield the state from liability. The frequent insolvency of the officer is the best evidence of the ineffective recourse of an injured individual against an administrative act in those countries.

Up to 1909 and 1910, when Prussia and the Empire assumed responsibility for the wrongful acts of officers, the liability of the officer

¹ De la responsabilité des fonctionnaires publics, by Maurice Bellom, *Rev. Pol. et Parl.*, 1903, 103, pp. 148-153; De la compétence des tribunaux judiciaires à l'égard des fonctionnaires de l'ordre administratif, by M. Massonié, 26 *Rev. Gen. du Dr.* (1902), 18-36; Depaule, J., *op. cit.*, 49, 107, 143, 159; Quaranta, *op. cit.*, in 16 *Il Filangieri*, 273 *et seq.*; Die Verwaltungsgerichtsbarkeit in Frankreich und der Conseil d'Etat, by W. Hagens, 17 *Archiv f. öff. Recht* (1902), 373-412, at 387; Geser, A., *Zivilrechtliche Verantwortlichkeit der Beamten*, Freiburg, 1899; Delius, *Haftpflicht der Beamten*, Berlin, 1909; Brand, A., *Das Beamtenrecht* (in Prussia), Berlin, 1914.

in Germany was perhaps greater than in other countries. In France, the liability of officers before the courts is both narrower and wider than in Anglo-American law—narrower, inasmuch as the ordinary courts are not allowed to decide the question of the jurisdiction of the administration, and wider, in that a purely personal act may render him liable in damages, whether done in the performance of a ministerial or discretionary duty.¹

In Anglo-American law, while in theory the liability of the officer is substituted for that of the state, in practice the officer is so well protected that the remedy is in many cases illusory. In England, a special act exists to protect public officers from suit, in addition to the general principles of the law which will be noticed presently. The Public Authorities Protection Act of 1893 (56 and 57 Vict., c. 61) protects public officers against claims which are ill-founded or stale, by providing for suit within six months. The act is intended to avoid unnecessary litigation.²

Among the most important limitations of Anglo-American law upon the civil liability of officers to individuals injured by their official acts, may be mentioned the following: judicial officers and those exercising judicial authority are immune from suit even for malice or corruption; the higher executive officers are equally immune from civil liability; inferior administrative boards or officers exercising discretionary authority can only be rendered civilly responsible for their acts if dishonesty or malice against the injured individual is proved. Again, officers owing a duty to the public at large and not to an individual in particular cannot usually be rendered civilly responsible for their wrongful acts injuring individuals, their responsibility being criminal or political only. Finally, ministerial officers acting under warrants from courts or—the tendency is—from superior administrative authorities having judicial powers are protected by warrants fair on their face and emanating from a body ostensibly having jurisdiction.³ While the act of an officer acting under an un-

¹ Goodnow, *op. cit.* II, 175.

² Chartres, John, *The Public authorities protection act, 1893*, London, 1912; 12 *Encyclopedia of the laws of England*, 2nd ed., 81; Bonnard, *op. cit.*, 69.

³ Chaster, A. W., *The powers, duties and liabilities of executive officers*, 5th ed., London, 1899, 150 *et seq.*; Mechem, *op. cit.*, § 656 *et seq.*; T. R. Powell in 24 *Harvard*

constitutional statute may be enjoined, the modern tendency, contrary to the older doctrine, is to hold that such statute protects the officer against an action for damages.¹ Public officers are not in general civilly liable to third persons for the acts of their official subordinates.²

A peculiar doctrine of Anglo-American law—the “act of state” doctrine—to which the Supreme Court has recently given definite sanction, serves to relieve officers of the government, under certain circumstances, from liability for injuries inflicted upon aliens in the course of their official duty. Burdick states the principle as follows:

“When an act, injurious to a foreigner, and which might otherwise afford a ground of action, is done by a British subject, and the act is adopted by the British government, it becomes an act of the State, and the private right of action becomes merged in the international question which arises between the British government and that of the foreigner.”³

These injuries are usually committed upon foreigners by naval or military officers, or by representatives of the government abroad, in dependencies or colonies. When the act has been adopted by the state as its own act, it covers the officer with the shield of immunity possessed by the state itself. The court has jurisdiction merely to establish the fact of the “act of state,” and in the event of an affirmative determination, the act and those responsible for it escape the jurisdiction of municipal courts.⁴ Where the victim is the subject of

L. R. 442. Liability for acts of public servants, by W. Harrison Moore, 23 Law Quar. Rev. (1907), 12-27. Liability of officers acting in a judicial capacity at the common law, by Arthur Biddle, 15 Amer. L. Rev. (1881), 427-448, 491-509; Liability of public officers to private actions for neglect of official duty, by T. M. Cooley, 3 Southern L. R. (1877), 531-552; Bonnard, *op. cit.*, 97 *et seq.*, 42 *et seq.*

It is to be noted that the state as well as the local corporation may and frequently does indemnify its officers for liability which they may incur in the discharge of their duties. Mechem, *op. cit.*, § 879; Goodnow, *op. cit.*, 160.

¹ Mechem, *op. cit.*, § 662 and cases cited. See also *Hopkins v. Clemson College*, 221 U. S. 636, 644; *Ex parte Young*, 209 U. S. 123.

² Mechem, *op. cit.*, § 789 *et seq.* Exceptions noted in § 790; Salmond, J. W., *The law of torts*, 3rd ed., London, 1912, p. 55.

³ Burdick, *op. cit.*, 37. See also definition of James Stephen quoted in Moore, W. Harrison, *Act of state in English law*, London, 1906, p. 93; Pollock, F., *The law of torts*, 8th ed., London, 1908, p. 111; 1 *Encyc. of the laws of England*, 2nd ed., p. 142.

⁴ The “Act of State” doctrine by H. T. Kingsbury, 4 A. J. I. L. (1910).

a weak state, the international remedy, which remains open, is quite ineffectual.

The highest executive officer and the ministers of state are usually more fully protected from judicial control and civil liability than other officers. Over their jurisdiction, there is in most countries no judicial control, and over their personal acts, in most of the European countries generally and in Latin-America, such control depends upon the preliminary authorization of the legislature.¹ In Anglo-American law, the highest executive officers are practically free from judicial control. But inasmuch as they act generally through subordinates, who are responsible for their actions and are not protected by the fact that they have acted on instructions from superiors, this immunity from judicial control is not so absolute as it might seem.² In most countries, there is a large parliamentary and political responsibility, usually fixed in the Constitution, and a certain criminal responsibility.

§ 72. Foreign States in Municipal Courts.

Having discussed at some length the liability to suit of the state and its organs and instruments of administration in its national courts, we may for a moment turn to the question of the suability of the state before foreign courts. It is a general rule of international law that courts will not exercise jurisdiction over foreign states, unless the action concerns local real estate or unless the foreign state voluntarily submits to the jurisdiction. The physical presence of movable property of the foreign state within the territory does not confer

359-372. The leading cases in Great Britain have been: *Buron v. Denman* (1848), 2 Exch. 167; *Luby v. Wodehouse*, 17 Irish C. L. R. 618; *Tandy v. Westmoreland*, 27 State Trials, 1246, 1264; *Poll v. Lord Advocate* (1899), 1 Fraser, 823; *Musgrave v. Chung Teeong Toy* (1891), A. C. 272; in the United States, *The Paquete Habana*, 189 U. S. 453, 465; *O'Reilly de Camara v. Brooke*, 209 U. S. 45, 52 (see criticism in *Kingsbury's* article, 364 *et seq.*); *Chuoco Tiaco v. Forbes*, decided May 5, 1913 (228 U. S. 549). Justice Holmes decided all three cases. See also *Wiggins v. U. S.*, 3 Ct. Cl. 412.

¹ *De la responsabilité civile des ministres*, by A. Vacherot, 13 Rev. Pol. et Parl. 38, pp. 251-270; *De la responsabilité pécuniaire des ministres*, by Ch. Roussel, 7 Rev. Dr. Pub. (1897), 385-416; Petel, A., *De la responsabilité du ministère public*, Paris, 1901.

² Goodnow, *op. cit.*, II, 164-166.

jurisdiction over the foreign state. In the Hellfeld case in Germany it was held that even though a foreign state (Russia) sues an individual and submits to a counterclaim, no execution can issue against the foreign state, notwithstanding the fact that it possesses property within the territory. The immunity of the foreign state extends to its sovereign, its ambassadors, and its public property. Attachment and garnishment proceedings against the property of foreign states or sovereigns are almost uniformly dismissed. Exceptions to these rules have been made in some cases by the courts of Belgium and Italy, which seem to have adopted the distinction of administrative law between transactions of the state *jure imperii* and *jure gestionis*, and to have exercised jurisdiction in the latter case.¹

¹ These questions are discussed at some length in the chapter on Contractual Claims, *infra*, § 118. In addition to the literature there cited, of which the work by Loening and the article by Droop in 26 Gruchot's Beiträge, 289-316, on comparative law, are the most illuminating, see De Paepe, Etude sur la compétence civile à l'égard des Etats étrangers, Bruxelles, 1894 and Féraud-Giraud, Etats et souverains, personnel diplomatique et personnes civiles devant les tribunaux étrangers, Paris, 1895; and articles on the subject by A. Hartmann in 22 R. D. I. (1890), 425-437; by C. F. Gabba in 15 Clunet (1888), 180-191, 16 Clunet (1889), 538-554 and 17 Clunet (1890), 27-41, and in 51 Giurisprudenza italiana, 65-80; by Cuvelier in 20 R. D. I. (1888), 109-131; and by von Bar in 12 Clunet (1885), 645-657. On the Hellfeld case (translated in 5 A. J. I. L., 1911, 490-519), see besides the work by Brie, Fischer and Fleischmann, the series of articles by Kohler, Laband, Meili and Seuffert in 4 Ztschr. f. Völkerrecht, 309 *et seq.*, summarized by Julius Hirschfeld in Journ. of Comp. Leg., March, 1911, 300-303, and the legal opinion of Conrad Bornhak in the case, printed in 5 Jahrbuch d. öff. Rechts (1911), 230-266. A severe criticism of the exceptional line of decisions of the Italian courts on this question is contained in two articles by Dionisio Anzilotti in 5 Ztschr. f. int. Priv. u. Strafrecht (1895), 24-37 and 138-147. Clunet makes it a point to report cases involving suits against foreign states and sovereigns in municipal courts.

CHAPTER IV

INTERNATIONAL RESPONSIBILITY OF THE STATE

§ 73. General Principles.

In preceding chapters we have examined the rights of aliens and the responsibility of the state and its officers, in municipal law, for a violation of the rights of the alien. We are now prepared to examine the final phase of the obligation of the state toward the alien and its responsibility for an infringement of his rights. This phase is the international liability of the delinquent state toward the alien's home state.¹

In the absence of an international legislature or court of justice the standard of duty of the state toward aliens and its international

¹ Funck-Brentano and Sorel (*Precis du dr. des gens*, 1877, p. 224), state that it was at one time asserted by a certain school of international law that reciprocal responsibility of states was incompatible with full sovereignty, and that the state was the judge of its own responsibility. With the growth of international intercourse, that theory has long been abandoned.

The subject of state responsibility in international law has been more or less neglected by writers, notwithstanding its great importance. The best works on the theory of the subject are: Anzilotti, D., *Teoria generale della responsabilità dello Stato nel diritto internazionale*, Florence, 1902, published in French, considerably paraphrased, in 13 *R. G. D. I. P.* (1906), 5-29, 285-309, and Marinoni, Mario, *La responsabilità degli stati per gli atti dei loro rappresentanti secondo il diritto internazionale*, Rome, 1914. See also Benjamin, Fritz, *Haftung des Staats aus dem Verschulden seiner Organe nach Völkerrecht*, Breslau, 1909 (a Heidelberg dissertation). The following works devote some space to the subject: Leval, G., *La protection diplomatique*, Bruxelles, 1907, Part II, p. 125 *et seq.*; Tchernoff, T., *Protection des nationaux*, Paris, 1899, p. 271 *et seq.*; Lisboa, H., *Les réclamations diplomatiques*, Santiago, 1908. The subject is treated of briefly in the following general works: Oppenheim, I, ch. III, 206-225; Hall, 214-220; Halleck, I, ch. XIII; Hershey, ch. X; Pradier-Fodéré, I, §§ 196-210; Calvo, § 1261 *et seq.*; Fiore, §§ 659-679; Liszt § 24; Triepel, 350; Gestoso y Acosta, I, 259-269; Olivart, I, 451-462; Seijas, III, 445-461 and in other volumes; Piédelièvre, I, 317-322; Bonfils, pt. I, ch. V; Bry, ch. X (1906 ed.), 454-461; Funck-Brentano and Sorel, 1877 ed., ch. XII, 224-230. Further literature will be cited under special topics.

responsibility for violation of its obligations may be considered the result of a gradual evolution in practice, states having in their mutual intercourse recognized certain duties as incumbent upon them. In the absence of a central authority to enforce this standard of duty upon the state of residence, international law has granted the home state of the alien who has suffered by a delinquency the right to demand and enforce compensation for the injuries sustained. The remedy for a violation of international duty toward aliens lies in a resort to diplomatic measures for the pecuniary reparation of the injury; and these measures may range from the diplomatic presentation of a pecuniary claim to war. Self-help, tempered by the peaceful instrumentalities of modern times, such as arbitration, is the ultimate sanction of international obligations. In this very fact lies the difficulty of the present subject, for powerful states have at times exacted from weak states a greater degree of responsibility than from states of their own strength. Nevertheless, fundamental principles have in the course of time, through a constant growth in the number of cases of protection and of international claims, become more clearly defined, so that a closer study of the subject may be fruitful of practical results.

It has already been remarked that international law imposes upon states the duty of according aliens certain rights and of assuring them of certain administrative and judicial protection. In almost every branch of international law, rules are found which limit the natural liberty of states by imposing upon them duties toward aliens. Any omission in these duties involves the responsibility of the delinquent state not only toward the individual directly (if so provided by municipal law), but also toward his home state, which in international theory is considered as injured in the person of its citizen. A state may limit its municipal responsibility by legislation, but not its international responsibility, which it incurs, under international law, to the national government of the alien. The national state enforces its own right, therefore, in presenting an international claim, although the pecuniary benefits of an indemnity may ultimately be awarded to the injured individual himself.

In considering the international responsibility of the state for de-

linquencies toward aliens, it may be well to recall certain fundamental principles.¹ An alien in entering a country submits tacitly to the local law, according to the rules of which his rights and duties are measured. If the local rules of civil and criminal law are applied to him without discrimination in the same degree as to nationals, he has no right to invoke the responsibility of the state for damage which he may sustain.² However unqualified this doctrine may be, as a matter of principle, the practice of the stronger nations in their relations with the exploited countries of the world has demonstrated that this axiom is conditioned upon the premise that the local civil and criminal law and its administration do not fall below the standard of civilized justice established by international law. Assuming that the international standard in a given case has not been transgressed by the municipal law of the state,—always a delicate and dangerous allegation—the duty of the alien's home state is confined to securing for him the benefit of the local law or indemnity for failure to extend it to him. In first instance the alien's right is measured by the municipal law of the state of residence.

Nor is the state a guarantor of the safety of aliens. It is simply bound to provide administrative and judicial machinery which would normally protect the alien in his rights. Even a treaty providing for "special protection" has been held not to be an insurance against all injury, but merely places aliens on an equality with citizens in this respect.³ As a general rule, moreover, the responsibility of the state for a failure to protect an alien is measured by its actual ability to protect.⁴

Again, before the international responsibility of the state may be invoked, the alien must under normal conditions exhaust his local

¹ The variations and modalities of and exceptions to these principles have been discussed *supra* under Aliens or will be treated under the special topics of this chapter.

² *White (Gt. Brit.) v. Peru*, July 1863, award April 13, 1864, Moore's Arb. 4967; *La Forte (Gt. Brit.) v. Brazil*, Jan. 5, 1863, Moore's Arb. 4925; McDonald's case (*Gt. Brit.) v. Prussia*, Calvo, III, § 1279. Cushing, Atty. Gen. in 7 Op. Atty. Gen. 229, 234.

³ Wadsworth, U. S. commissioner, in *Prats (Mex.) v. U. S.*, July 4, 1868, Moore's Arb. 2889; Baldwin (*U. S.*) *v. Mexico*, April 11, 1839, Moore's Arb. 2859.

⁴ Mr. Sherman, Sec'y of State, to Mr. Dupuy de Lôme, July 6, 1897, For. Rel., 1897, 516. But see Benjamin, *op. cit.*, 27.

remedies and establish a denial or undue delay of justice, which in last analysis is the fundamental basis of an international claim.¹

The liability of a state must be predicated on the violation in some respect of its international obligations. For present purposes our inquiry is confined to the duties of the state toward aliens. Some of the topics relating to this subject, such as admission, exclusion and expulsion, extradition, military service, civil rights, jurisdiction, arrest and imprisonment, etc., have been discussed under the head of Aliens. In the present and the following chapters we shall examine the responsibility of the state for injuries sustained by aliens during mob violence, civil war, international war and under other circumstances.

AUTHORITIES OF THE STATE

§ 74. Different Classes of Authorities.

Before examining these questions, however, it will first be necessary to determine the agencies, instruments or persons whose acts may render the state responsible—in other words, who are authorities of the state. This question is one of vital importance, as is apparent from the fact that general claims conventions usually provide that the state shall be held liable only for injuries inflicted upon the persons or property of foreigners by the “authorities” of the state. Our first inquiry therefore, will be directed toward establishing who are authorities or organs of the state, for whose action the state is directly responsible, and in the second place, who are the persons for whose acts towards aliens the state is held to indirect—or, as Oppenheim puts it, *vicarious*—responsibility, this indirect responsibility being predicated upon a negligent failure to prevent or punish the commission of the injurious act or to open to the injured alien the necessary judicial recourse against the individual wrongdoers.

Under the first head, we shall discuss those agencies of government whose acts may be said to represent the acts of the state, *i. e.*, the legislative, executive and judicial organs of the state. Here also will be considered the extent to which *de facto* governments, constituent states and minor political subdivisions of the state may be regarded as authorities. Under the second head, we shall discuss the position

¹ *Infra*, § 127 *et seq.*

of minor officials, soldiers and individuals, and the circumstances under which their acts may render the state internationally liable. The order of discussion will deviate somewhat from the above classification.

1. LEGISLATIVE AUTHORITIES

§ 75. Acts of Legislation.

The legislature is an organ of the state for whose acts the state is directly responsible.¹ It has been noted that in municipal law no action lies against the government for acts of legislation unless the statute itself or the constitutional law of the state so prescribes. But a statute is no defense against a breach of international obligations. When acts of legislation,—among which may be included administrative decrees and ordinances having the force of law—have been deemed violative of the rights of aliens according to local or international law, foreign governments have not acquiesced in the theory of the non-liability of the state and have on numerous occasions successfully enforced claims for the injuries sustained by their subjects. Good offices or remonstrances are often employed to prevent legislation deemed prejudicial to national interests. Where such an act is in direct violation of international law, responsibility is clear. Thus, since the Paris Declaration of 1856 blockades to be internationally recognized as binding must be effective. The attempts of some states, therefore, by legislative act or decree to establish a paper blockade of ports in the hands of insurgents have met with opposition from the home governments of nationals whose rights were thus prejudiced.² The mere closure of a port within its control or a decree of non-intercourse is ordinarily within the police power of the state and not a violation of international law.³

¹ Bonfils-Fauchille, 6th ed., § 325; Chrétien, *op. cit.*, § 208; Clunet, Consultation, *op. cit.*, 25; Audinet in 20 R. G. D. I. P. 5, 22.

² De Caro (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 817; Martini (Italy) *v.* Venezuela, *ibid.* 845; Orinoco Asphalt Co. (Germany) *v.* Venezuela, *ibid.* 588; Minister Furniss to the Haitian Secretary for Foreign Affairs, Nov. 28, 1908, For. Rel. 1908, 442. An executive decree comes within the same principle. French Co. *v.* Peru, Tchernoff, *op. cit.*, 299 note. Protest of U. S. against Guatemalan decree of 1909, For. Rel. 1909, p. 344.

³ Award of President of Chile on the claims of British subjects against Argentine

The institution of a governmental industrial monopoly, while not involving any municipal responsibility of the state unless so prescribed by the legislature, has on several occasions afforded ground for an international claim in behalf of aliens who had previously engaged in the industry now monopolized by the state. So, the sulphur monopoly of Sicily established by decree of July 9, 1838 was held on arbitration to be an interference with vested rights and to involve the international responsibility of that government.¹ The protests of Great Britain and France resulted in Uruguay's receding from its position in establishing a state monopoly of life insurance in its law of 1912. Italy in a similar case maintained its right to establish such a monopoly,² notwithstanding the opinion of many jurists that by so doing it incurred international responsibility.

Every state has the right to impose customs duties, which may be changed at the discretion of the government. There is no vested right in importers under the customs law which they may count upon.³ Nevertheless, it is unusual for governments to make sudden and unexpected changes in these laws or to apply them to previous transactions. Thus, Secretary of State Fish protested against certain Spanish customs laws in Porto Rico which imposed a heavy export tax on sugar and molasses, and were applied to preëxisting contracts of American citizens, concluded when no tax was in force.⁴ In the absence of treaty stipulation, there is nothing to prevent a government from legally imposing different import duties in one section of

for losses arising out of a decree of Feb. 14, 1845 prohibiting vessels from Montevideo to enter Argentine ports, Moore's Arb. 4916; Poggioli (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 870. The case is different where the state is estopped by contract from closing a port. Martini (Italy) *v.* Venezuela, *ibid.* 819. The state may legally suspend traffic on a river flowing through it. Faber (Germany) *v.* Venezuela, Feb. 13, 1903, Ralston, 626, 630.

¹ 30 St. Pap. 111-120; La Fontaine, Pasierisie, 97. See also Savage (U. S.) *v.* Salvador, Moore's Arb. 1855. Such right may be considered vested by treaty, contract, legislative act or even, it has been contended, by custom.

² *Supra*, p. 126.

³ Beckman (Germany) *v.* Venezuela, Feb. 13, 1903, Ralston, 599.

⁴ Mr. Fish, Sec'y of State, to Mr. Lopez Roberts, Spanish minister, April 3, 1869, Moore's Dig. VI, 752. The U. S. has on several occasions instructed its representatives abroad to use their good offices to prevent proposed increases of tariff duties deemed prejudicial to American interests.

its territory from those charged in another section.¹ The debasement of the currency by legislative decree, impairing the rights of American citizens, has on one or two occasions met with the earnest remonstrance of the United States.²

2. EXECUTIVE AND ADMINISTRATIVE AUTHORITIES

§ 76. Limitations upon their Power. Contractual Relations.

The organs of the state in its executive and administrative branch are determined by municipal constitutional law. In a few cases, the acts of the rulers of the state have been held to be internationally binding upon the state.³ But as a general rule, the power of the head of the state and of the cabinet ministers and higher officials to involve the state in responsibility is tested in first instance by municipal law.⁴ This is especially so in the matter of contractual obligations. The power of officers of the government, superior and inferior, to bind the government is limited by their legal authority to enter into such obligations.⁵ This authority is generally strictly

¹ *Bronner (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 2871.

² *Moore's Dig.* VI, 753-754. Venezuelan bond cases, *Aspinwall (U. S.) v. Venezuela*, Dec. 5, 1885, *Moore's Arb.* 3641-42. Claims were paid by Venezuela for the operation of the "stay" or "espera" law of 1849, which improperly provided for the extinction or suspension of debts due from Venezuelan debtors to foreign creditors. But the Act of Congress of 1862 making paper money legal tender was held not to involve the Government in liability, although it unfavorably affected preëxisting contracts. *Adams (Gt. Brit.) v. U. S.*, May 8, 1871, *Moore's Arb.* 3066.

³ Murat's orders to confiscate American vessels rendered the Government of the two Sicilies responsible. The Neapolitan Indemnity, *Moore's Arb.* 4575. Pres. Zaldívar by his own contract bound Salvador to sell the Salvadorean Government Printing Office to an Italian subject. *For. Rel.*, 1888, I, 77, 120.

⁴ Halleck, I, ch. XIII, §§ 3-4; Oppenheim, I, 211; Attorney-General Cushing in 7 Op. Atty. Gen. 238. *Day and Garrison (U. S.) v. Venezuela*, Dec. 5, 1885, *Moore's Arb.* 3563. *De facto* authorities, however, although not acting in strict accordance with the Constitution, may by their acts bind the nation. *Dreyfus (France) v. Chile*, July 23, 1892 (award, July 5, 1901), *Descamps & Renault, Rec. int. des traités du xx^e siècle*, 1901, pp. 396-398.

⁵ See *supra*, p. 170 (municipal responsibility) and *infra*, p. 299 (contract claims) and cases of Wallace, Beales, Zander, and Trumbull (an exceptional case) there cited. See also *Bernadou (U. S.) v. Brazil*, *Moore's Arb.* 4620; *Widman (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 3467; *Kearney (U. S.) v. Mexico*, *ibid.* 3468; *Rowland (U. S.) v. Mexico*, March 3, 1849, *ibid.* 3458; *Alvarez (U. S.) v. Mexico*.

construed. The President of a country cannot legally grant or alter the terms of concessions to foreigners, if the constitutional law of the country requires the approval of Congress for such acts. Those dealing with agents of the state are ordinarily bound by their actual authority, and not, as in private law, by their ostensible authority. But in the Trumbull case,¹ the apparent authority of a diplomatic officer to contract was held sufficient to bind his government, and in the Metzger case,² Judge Day expressed the opinion that the "limitations upon official authority, undisclosed at the time to the other government," do not "prevent the enforcement of a diplomatic agreement."

Again, presumably on the theory of quasi-contract or unjust enrichment, the state is liable for the wrongful acts of its officers from which it derives a benefit. Thus the taking of private property for the public use or benefit has always been an accepted ground of international claim for compensation.³ Similarly, for wrongful seizures and for excess or unjust collections of customs duties or taxes by revenue officers the government is responsible.⁴

April 11, 1839, *ibid.* 3426; Smith (U. S.) *v.* Mexico, March 3, 1849, *ibid.* 3456; Sturm (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 2756. This question was argued in the Hemming case before the British-American Claims Commission, Aug. 18, 1910, Great Britain contesting the general rule. No award has yet been made (1914).

¹ On equitable considerations, in Trumbull (Chile) *v.* U. S., Aug. 7, 1892, an award was made on the ground that claimant in Chile had a right to assume that the U. S. minister in engaging his legal services was authorized so to do, and that he was not bound by the limitations of R. S., § 3732. Neither diplomatic officers nor consuls, in the absence of specific instructions, have authority to employ counsel in extradition or other government cases. Cons. Reg., §§ 517, 530.

² Metzger (U. S.) *v.* Haiti, Oct. 18, 1899, For. Rel. 262.

³ Ashmore (U. S.) *v.* China, 1884, Moore's Arb. 1857; Baldwin (U. S.) *v.* Mexico, April 11, 1839, *ibid.* 3235; Metzger (Germany) *v.* Venezuela, Feb. 13, 1903, Ralston, 578; De Garmendia (U. S.) *v.* Venezuela, Feb. 17, 1903, *ibid.* 10; Putegnats Heirs (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3720. See also *infra*, p. 169. Even where the original taking of property is lawful, its unreasonable detention has been held to warrant an award. Baldwin, *supra*; Shaw (U. S.) *v.* Mexico, April 11, 1839, Moore's Arb. 3265; Bischoff (Germany) *v.* Venezuela, Feb. 13, 1903, Ralston, 581.

⁴ Monnot (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 171; Smith (U. S.) *v.* Mexico, April 11, 1839, Moore's Arb. 3374; Lewis (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 3019; *Only Son* (U. S.) *v.* Great Britain, Feb. 8, 1853, *ibid.* 3404; Mr. Davis to Mr. Foster, June 23, 1883, Wharton, I, 158.

§ 77. Tortious Acts.

It is when we come to deal with the international responsibility of the state for the torts of its administrative and executive officers that more serious difficulties are encountered. Some of the problems that at once present themselves are these: Did the officer act as an agent of the state, or in his personal capacity? Is the state, therefore, or he alone liable? Was he a superior officer whose acts within the scope of his authority directly bind the state, or an inferior or minor official against whom judicial remedies must be pursued and for those acts the state is not liable except in case of failure to afford judicial recourse to the person injured, or itself to punish the delinquent official? An examination of the cases shows the subject to be in the utmost confusion, and the distinctions just mentioned very vaguely drawn. Oppenheim and Hall remark that the wrongful acts of administrative officials (these officers being under the disciplinary control of the executive) are presumably acts sanctioned by the state, until such acts are disavowed, the authors punished, and pecuniary reparation made.¹ Strictly construed, this would make of the state practically a guarantor of the efficiency and correct operation of its administrative agencies. As a matter of fact the state is not responsible either for all its administrative officers or for all their acts. It may be said, first of all, that for such of their acts as are personal and outside the scope of their functions, they alone are liable and the duty of the state is limited to affording the injured person judicial recourse against the officer according to local law. As will be seen, this rule has even been extended to the official acts of some minor officials. It must be added, however, that notwithstanding the fact that the local law of most countries grants a private right of action against wrongdoing minor officials, foreign governments, especially in dealing with the weaker countries of Latin-America, have not been willing to confine their injured subjects to the dubious and often futile legal remedy against the officer, but have had recourse to diplomatic

¹ Oppenheim, I, 218; Hall, 214. Quoted with approval in Metzger (Germany) *v.* Venezuela, Feb. 13, 1903, Ralston, 578, and Gage (U. S.) *v.* Venezuela (by Bainbridge, Amer. commissioner) *ibid.* 165. Maal (Netherlands) *v.* Venezuela, Feb. 28, 1903, Ralston, 914 (government liable, "unless they reprimand, punish or discharge" the officer).

interposition when the wrongdoing official acted in his capacity as an agent of the government.

While it is generally admitted that the strict rules of agency do not apply to the relations between the government and its officers so as to make the former liable for all wrongful acts of the latter within the scope of their authority,¹ still international commissions have not always been guided by the distinction, and awards have been made on proof of the mere fact that an officer of the government committed the injury in question. Where the act has been that of a higher official or supreme authority in a given jurisdiction, the presumption is that it was an act of the state and the government has ordinarily been held to incur a direct responsibility.² An express or tacit ratification of the act clearly casts liability on the state.³ There have, however, been numerous cases of injuries by administrative officers, where no inquiry was directed toward establishing their superior or inferior official character or the possibility or fact of judicial recourse or punishment, government liability being predicated on the mere malfeasance or non-feasance of officers upon whom a distinct governmental duty was incumbent.⁴ Under this head, customs authorities

¹ See *dictum* by Duffield, Umpire, in *Christern (Germany) v. Venezuela*, Feb. 13, 1903, Ralston, 523.

² Even the possibility of legal recourse against the officer would hardly free the state from liability. See *Johnson (U. S.) v. Peru*, Dec. 4, 1868, Moore's Arb. 1656 (in addition, a decree for redress had been left unexecuted). See also *dictum* in *Oberlander and Messenger (U. S.) v. Mexico*, March 2, 1897, For. Rel., 1897, 386 citing *Calvo, III*, 120, and *Cinecua (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3127 (original in MS. Op. I, 14, 15, not quoted in Moore); *Lalanne and Ledour (France) v. Venezuela*, Feb. 19, 1902, Ralston, 501; *Post-Glover Co. (U. S.) v. Nicaragua*, March 22, 1900, For. Rel. 835 (governor of a province); *Magee (Gt. Brit.) v. Guatemala*, 1874 (flogging and unlawful imprisonment by order of Comandante), 65 St. Pap. 875. But see *Bensley (U. S.) v. Mexico*, March 3, 1849, Moore's Arb. 3018, where Government was held not liable for personal act of Governor of a constituent state of Mexico.

³ *Eclipse (U. S.) v. Mexico*, March 3, 1849, Moore's Arb. 3397; *Comp. Gen. des Asphaltes (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 338; *Fiore, Nouv. dr. int. pub.* (Antoine's trans.), §§ 667, 668.

⁴ Mr. Everett to Mr. Carvallo, Feb. 23, 1853, Moore's Dig. VI, 741. (It was sought to hold Chile liable for spoliations by "officers" of Chile.) *Moses (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3127; *Henriquez (Netherlands) v. Venezuela*, Feb. 28, 1903, Ralston, 896; *Crossman (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *ibid.* 298;

have frequently been held to be authorities whose unlawful acts involve a direct responsibility of the state.¹

§ 78. Diplomatic, Naval and Military Officers.

Diplomatic officers are considered authorities of the state with respect to all acts within the apparent scope of their authority.²

The heads of the military arm of the government, the commander of vessels and of armed land forces are presumed to represent the state in their official acts, and to involve its responsibility for unlawful acts inflicting injury upon aliens.³

In the cases of commanders of vessels, even if the government dis-

Culliton case in Colombia, 22 Op. Atty. Gen. 32, Feb. 7, 1898; *Canada* (U. S.) v. Brazil, March 14, 1870, Moore's Arb. 1733; see also *supra*, p. 185, note 1.

¹ For wrongful collections of customs and confiscation of goods, see *supra*, note 4, p. 184. For unlawful seizures and detentions of vessels and unjustifiable refusal to clear vessels, see *Labuan* (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3791; *William Lee* (U. S.) v. Peru, Jan. 12, 1863, *ibid.* 3405; *Sibley* (U. S.) v. Mexico, April 11, 1839, *ibid.* 3045; *Hammond* (U. S.) v. Mexico, Apr. 11, 1839, *ibid.* 3241; *Lalanne* (France) v. Venezuela, Feb. 19, 1902, Ralston, 501; *Ballistini*, *ibid.* 503; *Comp. Gen. des Asphaltes* (Gt. Brit.) v. Venezuela, *ibid.* 336. See also revenue cases in Moore's Arb. 3361-3407. Where seizures have been based on alleged violations of local law, international commissions will, virtually as a court of appeal, reexamine the legality and regularity of the seizure. *Phare* (France) v. Nicaragua, Oct. 15, 1879, La Fontaine, 225, Moore's Arb. 4870; *Havana Packet* (Netherlands) v. Dominican Rep., March 26, 1881, La Fontaine, 241, Moore's Arb. 5036; *Butterfield* (U. S.) v. Denmark, Dec. 6, 1888, Moore's Arb. 1204; *Consonno* (Italy) v. Persia, June 5, 1890, La Fontaine, 342. As to sanitary authorities, see *Lavarello* (Italy) v. Portugal, Sept. 1, 1891, La Fontaine, 411.

² In *Trumbull* (Chile) v. U. S., Aug. 7, 1892, Moore's Arb. 3569 the rule was extended to include acts within the minister's ostensible authority. It is probable that a lease signed by a diplomatic representative of a foreign government would bind his government.

A consul's authority to bind his government would be more strictly construed. Responsibility for unauthorized acts when acting in the interests of private persons, *e. g.*, the settlement of estates, has been held to rest upon the consul and not upon the government. For wrongful official acts such as unlawful refusal to clear vessels, the government has been held responsible. (*Comp. Gen. des Asphaltes*, Gt. Brit. v. Venezuela, Ralston, 336.) The advice of a consul or of a minister as to what his government will consider contraband, as to what cargo is exempt, as to what class of trade is permissible, etc., does not bind his government. *The Hope*, 1 Dodson, 229; *The Joseph*, 8 Cranch, 451; *The Benito Estenger*, 176 U. S. 568, 574.

³ *Maninot* (France) v. Venezuela, Feb. 19, 1902, Sen. Doc. 533, 59th Cong. 1st sess. 44, 70.

avows the act, indemnities have been awarded. Thus, in 1868 the cabinet at London disapproved the conduct of a captain of an English ship of war which without orders bombarded the city of Cape Haitien and blockaded the port. Great Britain indemnified the French and German merchants whose property and goods were thereby destroyed. Similarly, a violation of frontiers, collision of a private vessel with a national public vessel through the latter's fault, or the illegal capture of private vessels involves the responsibility of the state.¹ Unlawful captures by privateers involve the responsibility of the state,² but not the acts of a vessel which has revolted against the government.³

By article 3 of the Hague Convention of 1907 concerning the laws and customs of war on land, the state is made liable for all acts committed by persons forming part of its armed forces.⁴ In the case of pillage by uniformed soldiers, the state is ordinarily only responsible if they are under the command of officers.⁵

Police officials are not usually held to be "authorities" of the state. Nevertheless when the duty is incumbent upon them to prevent a violation of law, and they forsake their preventive function and actually

¹ Bry, 5th ed. (1906), p. 461; Case of the *Panther*, 1906 (Brazil) v. Germany, Oppenheim, 219 (violation of Brazilian territory); The Schooner *Henry* (U. S.) v. Peru, March 17, 1841, Moore's Arb. 4601 (seizure of vessel); *Confidence* (Gt. Brit.) v. U. S., Feb. 8, 1853, Moore's Arb. 3063 (collision); *Lindisfarne* (Gt. Brit.) v. U. S., Aug. 18, 1910, 7 A. J. I. L. 875. See also 14 Clunet (1887), 598, Bonfils, § 329, Calvo, § 1265, and Moore's Dig. VI, § 1008. Congress occasionally refers to the courts the complaints of aliens arising out of collisions between foreign ships and U. S. public vessels. S. 4273, 63rd Cong., 2nd sess. See also 23 Stat. L. 496 and *supra*, p. 166.

² France v. New Grenada, Ecuador and Venezuela, 49 St. Pap. 1301; Great Britain v. Buenos Ayres, July 19, 1830, 18 St. Pap. 685, La Fontaine, 92; U. S. v. Venezuela, May 1, 1852, Malloy, Treaties, 1910, II, 1842.

³ Case of the Peruvian vessel *Huascar*, 68 St. Pap. 745. A decree rejecting responsibility for her acts had been issued by Peru, May 8, 1877. Even in the absence of a decree, her responsibility is doubtful.

⁴ Oppenheim, I, 218; Hall, 214; Adams (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3065. For appropriations of private property and unnecessary devastation, see cases in Ralston's International Arbitral Law, § 605 *et seq.*, and *infra*, §§ 80, 104. Baasch and Römer (Netherlands) v. Venezuela, Feb. 28, 1903, Ralston, 909. Speyers (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2868 (tariff promulgated by commanding general). A military occupant may establish a nationally valid tariff. McCalmont (Gt. Brit.) v. U. S., Feb. 8, 1853, Moore's Arb. 2866.

⁵ *Infra*, p. 193.

participate in such violation, their action seems to involve a direct responsibility of the state.¹

§ 79. Minor Officials.

The presumption that the international responsibility of the state is engaged by the unlawful acts of its agents does not as a general rule extend to the tortious acts of minor officials, unless the government by some delinquent action of its own—either failure to afford redress in its courts to the injured individual or to punish the guilty officer—may be considered as having adopted or sanctioned the wrongful act. This is especially true of such personal and malicious acts as are outside the scope of the officer's real or apparent authority. It has already been noted that the municipal law of different countries varies as to the responsibility for a wrongful act of an officer, some states, such as the United States and various countries of Latin-America denying all responsibility for torts of officers and remitting the injured individual solely to his action against the officer, and other states, such as France and Germany, assuming a large measure of responsibility for its officer's official acts but denying liability for his personal acts.² That the rule of international law first above mentioned has suffered numerous exceptions, we have already had occasion to note; yet an examination of a great many cases confirms the view that as a general principle the state is not responsible for the wanton or unlawful acts of its minor officials, unless it has directly authorized, or after notice, failed to prevent, the act, or by failure to arrest, try or punish the guilty offender, or to allow free access to its courts to the injured parties, it may be charged with actual or tacit complicity in the injury.³ One important reason for this rule is that the wrongful act of the minor official is not presumed to be the act of the state until

¹ Panama riot, July 4, 1912; A riot which occurred at Panama April 2, 1915, in which a policeman killed a U. S. soldier, will probably render the Panaman government liable; Claim of Shipley in Turkey, For. Rel. 1903, 733; Cesarino (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 770.

² *Supra*, §§ 55, 60.

³ Calvo, § 1263 *et seq.*; Bonfils, § 330; Fiore, *op. cit.*, § 667; Moore's Dig. VI, §§ 999-1000; Anzilotti, in 13 R. G. D. I. P. (1906), 288-292. The Salvadorean law of May 10, 1910 concerning claims against the government is based on these principles, as expounded by Fiore.

some state organ, either a higher court or superior administrative authority, by some independent action or omission, has tacitly ratified the act.

In contractual cases, it is usually a necessary condition of direct governmental liability, that the officer be employed by the government, and be not merely a municipal officer. Nor does the fact that the government issues licenses to particular persons, such as pilots, or grants certain monopolies of public service to individuals make the licensee or monopolist an agent of the state capable of engaging its direct responsibility.¹

It seems clear that for personal acts of local or minor officials plainly outside of their authority and not incidental to their functions, the officer alone and not the government is responsible.² Difficulty arises because the line between personal and official acts is often exceedingly vague. Even if the tort of the officer is within the scope of his functions, unless the government actually benefit by the tort, it has often been held that the only remedy is against the officer and not against the government,³ although, as has been observed, such a state of facts has frequently been held a ground of state liability, especially in Latin-America.

¹ *Horatio* (U. S.) *v.* Venezuela, Dec. 5, 1885, 3023; Cushing in 7 Op. Atty. Gen. 237 (Montano case); *Mark Gray* (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 33.

² See Mr. Bayard to Mr. West, June 1, 1885, For. Rel. 1885, 457 (wanton killing of an arrested person by a sheriff after execution of the writ, due to personal malice. This ruling has, however, been called in question); *Bensley* (U. S.) *v.* Mexico, March 3, 1849, Moore's Arb. 3018 (forcible seizure of a boy). See extracts in Moore's Dig. VI, 742-743. *Wilson* (U. S.) *v.* Mexico, March 3, 1849, Moore's Arb. 3021 (cheat practiced by a municipal guard); *Cahill* (U. S.) *v.* Spain, Feb. 11, 1871, *ibid.* 3066 (ruin of business by alleged machinations of minor official—probably *dictum*). But where an assault is connected with an officer's official duty, the government has been held liable. *Metzger* (Germany) *v.* Venezuela, Feb. 13, 1903, Ralston, 578 (incidental to taking property for public use). So where police officers commit a wanton assault, *supra*, note 1, p. 189, and "La Masica" case (Gt. Brit.) *v.* Honduras, Memoria de . . . relaciones exteriores, 1911-12.

³ Atty. Gen. Griggs in 22 Op. Atty. Gen. 64, May 4, 1898 (illegal seizures of vessels); Akerman, Atty. Gen., in 13 Op. Atty. Gen. 553 (act of corruption of inferior judge in Brazil); Cushing in 7 Op. Atty. Gen. 237; *Slocum* (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3140; *Forrest* (U. S.) *v.* Venezuela, Dec. 5, 1885, Moore's Arb. 2947; Mr. Tripp to Mr. Mix, Oct. 11, 1893 and Mr. Uhl to Mr. Tripp, Nov. 17, 1893, For. Rel., 1894, 23-26 (blunder of local officers in Austria).

International commissions have repeatedly held that in order to hold the government liable for the acts of an officer the claimant must resort to the courts of the country and show an unsuccessful appeal for redress against the officer.¹

It has been held that the government must have had notice or been notified of the injury before it could be made responsible.²

A government may often release itself from liability by punishing the officer,³ for example, by fine, reprimand and dismissal from office,⁴ although, in flagrant cases, indemnities have been demanded and paid. The Court of Claims has held that a mere disavowal of the act is not sufficient internationally to relieve the government from liability.⁵ In dealings with countries of the Far East and with certain countries of Latin-America in which disorder is not an abnormal condition, a request for punishment of the officer is often combined with a demand for a suitable indemnity.

It has already been observed that the responsibility of the state for the acts of minor officials must ordinarily be predicated upon some independent delinquency of its own. Some of these circumstances upon which a complicity of the government is presumed and a resultant liability is founded are the following: a ratification or tacit adoption of the wrongful act;⁶ a negligent failure or refusal to prevent

¹ The rule applies to the acts of inferior judges as well as to other minor officials. *Blumhardt (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3146; *Wilkinson (U. S.) v. Mexico*, *ibid.* 3145; *Smith (U. S.) v. Mexico*, *ibid.* 3146; *Burn (U. S.) v. Mexico*, *ibid.* 3140; *Jennings et al. (U. S.) v. Mexico*, *ibid.* 3135; *Leichardt (U. S.) v. Mexico*, *ibid.* 3133; *Cramer (U. S.) v. Mexico*, *ibid.* 3250; *Bensley (U. S.) v. Mexico*, March 3, 1849, *ibid.* 3016; *Wilson (U. S.) v. Mexico*, *ibid.* 3021; *De Zeo (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 693; *Croft (Gt. Brit.) v. Portugal*, Award Feb. 7, 1856, Moore's Arb. 4979.

In flagrant cases, however, this appeal for judicial redress has not been required. *Davy (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 410.

² *Horatio (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3024; *Isaiah Stetson case (U. S.) v. Brazil*, For. Rel. 1895, I, 52-59 (two soldiers convicted and sentenced to penitentiary for murder of U. S. citizens in street brawl).

³ *Kellett (U. S.) v. Siam* (award Sept. 20, 1897), Moore's Arb. 1862.

⁴ *Wright Claim v. Guatemala*, 1908, For. Rel., 1909, 354-355; *Pierce (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3252; *Maal (Netherlands) v. Venezuela*, Feb. 28, 1903, Ralston, 914; *Panama police assaults* of July 4, 1912.

⁵ *Straughan v. U. S.*, 1 Ct. Cl. 324.

⁶ *Montano (Peru) v. U. S.*, Jan. 12, 1863, Moore's Arb. 1630 (approval by Sec'y of

the wrong, there being opportunity therefor; ¹ a refusal to investigate an assault or other injurious act, ² or negligence in investigating a case; ³ a failure to furnish access to the courts to the injured individual ⁴ or by a pardon depriving an injured party of all redress against the guilty offenders; ⁵ or a failure to try to arrest and punish the offender ⁶ even though no request for such punishment was made. ⁷ As will be seen hereafter, these circumstances have also served to fasten liability on the state where the injury was committed by an individual. (*Infra*, § 87.)

When a citizen of the United States is injured abroad by a minor official of a foreign government, the Department of State usually calls upon the foreign government to manifest its disapproval of the conduct of its officer, by reprimanding, dismissing, or punishing the guilty official and in addition often demands the adoption of measures to prevent a recurrence of the offense, and in flagrant cases, a pecuniary indemnity. When the guilty officials are police officers,

State Marcy of the wrongful act of a marshal in negligently failing to execute a private judgment). *Braden v. U. S.*, 16 Ct. Cl. 389 (ratification by Congress of unauthorized act); *Miller (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2974 (appointing the wrongdoer to high office in the government—*Dictum* by Lieber); see also *Bovallins and Hedlund (Sweden and Norway) v. Venezuela*, March 10, 1903, Ralston, 952.

¹ *Jonan (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3251; *Kellett (U. S.) v. Siam*, *supra*, *ibid.* 1862, La Fontaine, 604; *Schooner Hope (U. S.) v. Brazil*, Jan. 24, 1849, Moore's Arb. 4615; *Stubbs (U. S.) v. Venezuela*, 1903 (U. S. brief, Morris' Report, 122); Panama police assaults, July 4, 1912, MS. Dept. of State; *Garrison (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3129 (prevention of appeal by unlawful intrigues); *Arménie claim (France) v. Turkey*, 1894, 2 R. G. D. I. P. (1895), 623.

² *Bark Jones (U. S.) v. Great Britain*, Feb. 8, 1853, Moore's Arb. 3050. See also Rule 3 of Nicaraguan Mixed Claims Commission, 1911.

³ Panama police assaults, July 4, 1912; *De Brissot et al. (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 2967 (laxness in investigating).

⁴ *Calvo*, § 1263. This is of course equivalent to a denial of justice.

⁵ *Cotesworth and Powell (Gt. Brit.) v. Colombia*, Dec. 14, 1872, Moore's Arb. 2050, 2082, and case of Joy, a British subject in Colombia, decree of Dec. 7, 1868, cited at p. 2085.

⁶ *Wilson case (U. S.) v. Nicaragua*, 1894, For. Rel., 1894, 470 *et seq.*; *Zambrano case (Mexico) v. U. S.*, For. Rel. 1904, 473-482; *De Brissot (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 2967; *Maal (Netherlands) v. Venezuela*, Feb. 28, 1903, Ralston, 914; *Davy (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *ibid.* 410; *Dominique (France) v. Venezuela*, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 185, 207.

⁷ *Bovallins (Sweden and Norway) v. Venezuela*, March 10, 1903, Ralston, 952.

whose special duty it is to protect the person and property of individuals, a flagrant case arises which calls for prompt demands for redress and indemnity.¹

§ 80. Soldiers.

Soldiers are an integral part of the military arm of the government. Soldiers may be considered authorities rendering the state liable for their acts when they are under the command of officers or are carrying out public duties of the state. On the other hand, practice has fairly well established the rule that the state is not responsible for the wrongful acts of unofficered soldiers, whether incident to a belligerent operation or merely wanton and unauthorized acts of robbery and pillage.² The claimant's remedy is against the individual wrongdoer. To render the government liable for the unlawful acts of its

¹ Assaults by police in Panama upon sailors of U. S. S. *Columbia*, 1906, and *Buffalo*, 1908, For. Rel. 1909, 474, 485, 491; also assaults of July 4, 1912 and April 2, 1915. Assault on H. B. Miller of U. S. S. *Tacoma* by police in Santiago, Cuba, 1909.

² Plundering and pillaging incident to attack. *Vesseron (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2975, and following cases before same commission; *Dresch, ibid.* 3669; *Michel, ibid.* 3670; *Weil, ibid.* 3672; *Antrey, ibid.* 3672; *Denis, ibid.* 2997; *Friery, ibid.* 4036; *Cooper, ibid.* 4039; *Buentello, ibid.* 3670; *Schlinger, ibid.* 3671; *Tripler, ibid.* 2997; Rule 3 of Nicaraguan Mixed Claims Com. 1911 (all cases of marauding, pillaging, or robbery incident to military operations, attacks on towns, etc.). *Parker (U. S.) v. Mexico*, Moore's Arb. 2996; *Foster (U. S.) v. Spain*, Feb. 12, 1871, *ibid.* 2998; *Vidal (France) v. U. S.*, Jan. 15, 1880, *ibid.* 2999; *Castelain (France) v. U. S.*, *ibid.* 3000; *Hayes (Gt. Brit.) v. U. S.*, May 8, 1871, *ibid.* 3688; *Henriquez (Netherlands) v. Venezuela*, Feb. 28, 1903, *Ralston*, 911; *Shrigley (U. S.) v. Chile*, Aug. 7, 1892, Moore's Arb. 3712; *Bacigalupi (U. S.) v. Chile*, May 24, 1897 (extending convention of Aug. 7, 1892), No. 42, Report of Commission, 1901; *Magoon's Reports*, 343; *Edgerton (Gt. Brit.) v. Chile*, Recl. pres. al Trib. Anglo-Chileno, I, 126 (All cases of wanton and unauthorized acts of pillage or violence). See also *Crossman (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *Ralston*, 299. *Mr. Bayard to Mr. Buck*, Oct. 27, 1885, For. Rel. 1885, 625; *Magoon's Reports*, 338, 342; *Claim of Laurent and Lambert v. U. S.*, For. Rel. 1907, I, 392, especially Solicitor's memorandum, 396-398.

But see *Eigendorff (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2975, and *Pears' case (U. S.) v. Honduras*, For. Rel. 1900, 674-702 (negligently shot by sentinel; indemnity of \$10,000 paid). *Young's case (U. S.) v. Peru*, Moore's Dig. VI, 758-759; *Campbell's case (U. S.) v. Haiti*, Moore's Dig. VI, 764 (assault by soldiers; \$10,000 indemnity paid). See also assaults by police officers, note preceding.

soldiers the claimant must prove ¹ that they were under the command or orders or control or in the presence of superior officers,² or that the officers negligently failed to take the necessary precautions to prevent the unlawful acts³ or to punish the known offenders.⁴ In France and Germany, it will be recalled, soldiers under command or in the accomplishment of public duties are held to be authorities of the state for whose acts the government is municipally responsible. When the injurious act may be construed as a military necessity⁵ or as war damages (*infra*, § 98 *et seq.*) the government is relieved from liability. However, if private property unlawfully taken by soldiers without authority is applicable to the proper use of the army and actually appropriated to army use, the government has been held liable.⁶ Governments have occasionally paid damages for pillaging by government troops,⁷ and if indemnities are awarded

¹ Weil, *supra*, Moore's Arb. 3671; Vidal, *ibid.* 2999, Hayden, *ibid.* 2995; Culberson, *ibid.* 2997 and other cases cited in last note.

² Wilkins (U. S.) *v.* Mexico, March 3, 1849, Moore's Arb. 2993; Terry and Angus, *ibid.* 2995; Standish, Parsons and Conrow (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3004; Webster, *ibid.* 3004; Dunbar and Belknap, *ibid.* 2998; Newton and Lanfranco, *ibid.* 2997; Jeannaud (France) *v.* U. S., Jan. 15, 1880, *ibid.* 3000; Roberts (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 142; Ruden (U. S.) *v.* Peru, Jan. 12, 1863, Moore's Arb. 1653; Delgado's case *v.* Spain, Moore's Dig. VI, 761; Etzel's case *v.* China, For. Rel., 1904, 168-176, Moore's Dig. VI, 765.

³ Jeannaud, *supra*, Moore's Arb. 3000; Latorre (Gt. Brit.) *v.* Chile, 1891, Reclam. pres. al Trib. Anglo-Chileno, II, 88; De la Cruz (Mexico) *v.* U. S., July 4, 1868, MS. Op. II, 527 (not in Moore); Kunhardt (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 63, 69; Shrigley (U. S.) *v.* Chile, Aug. 7, 1892, Moore's Arb. 3712. See Wadsworth, American commissioner, in Moore's Arb. 2437; Anciana (Mexico) *v.* U. S., *ibid.* 3007 (mustering out U. S. soldiers on Mexican territory held negligent).

⁴ Watkins and Donnelly (Gt. Brit.) *v.* U. S., May 8, 1871, Hale's Rep. 45; De la Cruz (Mexico) *v.* U. S., July 4, 1868, MS. Op. II, 527; Eigendorff (U. S.) *v.* Mexico, Moore's Arb. 2975, and Wadsworth's *dictum*, *ibid.* 2437; Anciana (Mexico) *v.* U. S., July 4, 1868, *ibid.* 3007; Maninot (France) *v.* Venezuela, Feb. 17, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 44, 70.

⁵ Webster (U. S.) *v.* Mexico, Moore's Arb. 3004; Jeannaud (France) *v.* U. S., Jan. 15, 1880, *ibid.* 3000.

⁶ Lavell and other cases (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 3688; Vidal (France) *v.* U. S., Jan. 15, 1880, *ibid.* 2999; Rule 4 of Nicaraguan Mixed Claims Com. 1911.

⁷ *E. g.*, Chile in several cases before Anglo-Chilean tribunal of 1891, Strobel's report, item V, For. Rel. 1896, 35. This allowance was probably due to the wording of the protocol.

to other foreigners, the United States would probably demand equal treatment for its citizens.

Inasmuch as commanding officers are to a certain broad extent responsible for the conduct of soldiers under their command, it may happen that in certain cases of proved negligence or carelessness on the part of such officers in failing to prevent an act of depredation by troops, the government may be charged with liability. It is in this sense that we must understand the somewhat ambiguous instruction of Secretary Bayard in 1885, the concluding sentence of which reads: "But the mere fact that soldiers, duly enlisted and uniformed as such, committed acts 'without orders from their superiors in command' does not relieve their government from liability for such acts."¹

3. JUDICIAL AUTHORITIES

§ 81. Position of Courts and Judges.

The highest courts are authorities whose wrongful acts involve the state in liability. In well-regulated states, the courts are more independent of executive control than any other authorities, not excepting the legislature.² Their errors, therefore, in all systems of civilized justice give rise merely to such rights of appeal as are provided in local municipal law, but do not give rise, in civil cases, either to an action against the judge or against the state. It has been observed³ that certain foreign countries and recently two states in this country accord a right to claim indemnity from the state for an erroneous conviction in criminal cases. For flagrant acts of corruption or malfeasance in office a personal action against the judge is sometimes granted, although on principle a judge is responsible for official wrongs not to third persons but to the state alone. He may be indictable for malicious usurpation of power, but the state is not liable for such abuse of authority.

¹ Mr. Bayard to Mr. Buck, Oct. 27, 1885, For. Rel. 1885, 625. See also *Maninot (France) v. Venezuela*, Feb. 17, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 44, 70.

² Hall, 215; Oppenheim, 216; *Fabiani (France) v. Venezuela*, Feb. 24, 1891, Moore's Arb. 4878, at 4906; *Croft (Gt. Brit.) v. Portugal*, award of Hamburg Senate, Feb. 7, 1856, 50 St. Pap. 1288, Moore's Arb. 4979; *Tchernoff*, *op. cit.*, 268, 288.

³ *Supra*, p. 129.

These principles of municipal law are observed in the international relations of states, so that as a general rule the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort.¹ In a subsequent chapter (*infra*, § 127 *et seq.*) the whole question of denial of justice will be examined in detail. Our present inquiry will be confined to an examination of the cases in which liability has been sought to be fastened upon governments for the acts of their judicial authorities, not amounting technically to a denial of justice.

The Department of State has on a number of occasions expressed its adherence to the rule that a government is not responsible for the mistakes or errors of its courts.² For excess of jurisdiction by the

¹ There are exceptions to the rule, for unjust judgments have at times served as a ground of diplomatic interposition even where there was no technical denial of justice. This is approved by Triepel (p. 350, note 3) and Wheaton (Dana's ed., § 391), but is opposed by Phillimore, II, 4; Creasy, 337; and Liszt, 9th ed., 182, on the ground that the state has fulfilled its duty by referring the matter to independent courts. Anzilotti insists strongly on the distinction between unjust judgments reached without violation or misapplication of municipal or international law, and violations of law amounting to a denial of justice. Only in the second case does he find any international responsibility. 13 R. G. D. I. P. (1906), 21-25, 296-298. This just theoretical distinction is not usually observed in international practice; the line between an unjust judgment reached by proper observance of the forms of justice and a denial of justice is exceedingly vague, for responsibility is often asserted in either case.

² Mr. Marcy, Sec'y of State, to Chevalier Bertinatti, Dec. 1, 1856, Moore's Dig. VI, 748 (court exceeding jurisdiction). Mr. J. C. B. Davis to Mr. Chase, Jan. 10, 1870, *ibid.* 750; U. S. *v.* Dunnington, 146 U. S. 338, 351. Nor is the judge personally responsible for his errors to third parties. Mr. Davis to Mr. Chase, Jan. 10, 1870, Moore's Dig. VI, 750; Tchernoff, 288.

The rule has been supported by international tribunals. Barron, Forbes and Co. (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 2525; Yuille, Shortridge & Co. (Gt. Brit.) *v.* Portugal, March 8, 1861, La Fontaine, 378; Alfaya (U. S.) *v.* Spain, Feb. 12, 1871, not in Moore.

By way of exception, Great Britain granted to an American citizen (Lillywhite) compensation for his erroneous conviction and imprisonment in New Zealand, to which even a British subject would not have been entitled. For. Rel. 1901, 231-236. Similarly, France paid a heavy indemnity to Great Britain for the erroneous conviction and detention of Mr. Shaw, a British subject, in Madagascar, 19 Hertslet's Com. Treaties, 201-203. See also *Bark Jones* (U. S.) *v.* Great Britain, Feb. 8, 1853, Moore's Arb. 3051, where an erroneous assessment of costs was considered a ground of government liability. In addition, the government declined to investigate, on remonstrance.

courts Secretary Marcy denied any international responsibility of the state, although he admitted a personal responsibility of the judges.¹ Nevertheless Prof. de Martens in the *Costa Rica Packet* case,² one of the most important of recent arbitrations, held the Dutch Government liable for the (as he found) wrongful exercise of jurisdiction by a Dutch court over a British captain on account of certain alleged offenses committed beyond the three-mile limit. Notwithstanding the fact that the court found it had no jurisdiction and acquitted the defendant, de Martens held the Netherlands government liable for having ordered the detention and for certain hardships connected therewith. Few arbitral awards have been more severely criticized than the decision in the *Costa Rica Packet* case.³

While, on principle, the erroneous or merely unjust decision of a court involving no unlawfulness or irregularity in procedure should not involve the state in responsibility,⁴ the failure of the higher courts to disapprove violations of national or international law by minor officials or other authorities fixes an international responsibility upon the state,⁵ and a flagrant or notorious injustice is not easily distinguishable from a denial of justice. Similarly, the judgment of a court in violation of a treaty⁶ or of international law serves to render the state responsible.

¹ Mr. Marcy to Chevalier Bertinatti, Dec. 1, 1856, Moore's Dig. VI, 748. *Contra*, Earl Granville to Mr. Morier, Sept. 30, 1881, 74 St. Pap. 1172.

² *Costa Rica Packet* (Gt. Brit.) v. Netherlands, May 16, 1895, Moore's Arb. 4948-4954; 89 St. Pap. 1181 *et seq.*, 1284.

³ Baty, International law, 197, 227-231. See also the following articles on the case: A. E. Blès in 28 R. D. I. (1896), 452-468; Jules Valéry in 5 R. G. D. I. P. (1898), 57-66; Gustave Regelsperger in 4 R. G. D. I. P. (1897), 735-745; Tchernoff, *op. cit.*, 290.

⁴ The earlier writers considered an unjust judgment a ground for reprisals, and equivalent to a denial of justice. See citations from Grotius, Bynkershoek and Vattel referred to by Wheaton, Dana's Wheaton, § 391. This view is approved by Wheaton and Triepel, *supra*, p. 350, note 3.

⁵ *E. g.*, many decisions of prize courts supporting unlawful captures. Dana's Wheaton, §§ 392, 396. See Kane's notes on Convention with France of July 4, 1831, p. 31 and unlawful exactions of duties by Denmark at Kiel, confirmed by Danish courts, 20 St. Pap. 838, and Danish indemnities under treaty of March 28, 1830, Dana's Wheaton, § 397.

⁶ Van Bokkelen (U. S.) v. Haiti, May 24, 1888, Moore's Arb. 1807, 1822; La Fontaine, 307; Yuille, Shortridge and Co. (Gt. Brit.) v. Portugal, March 8, 1861, 61 St. Pap. 841; La Fontaine, 377-385.

It is a fundamental principle that the acts of inferior judges or courts do not render the state internationally liable when the claimant has failed to exhaust his local means of redress by judicial appeal or otherwise,¹ for only the highest court to which a case is appealable may be considered an authority involving the responsibility of the state.²

The regularity and legality of a court's practice and procedure are to be judged by the local law, which need not, however, manifest the liberal principles of Anglo-American law. For example, even in countries in which the inquisitorial system of criminal law prevails, a fair application of the law to aliens and citizens alike removes all ground of complaint on the part of foreign countries, even of those adopting the accusatory system. Provided the system of law conforms with a reasonable standard of civilized justice and provided that it is fairly administered, aliens have no cause for complaint in the absence of an actual denial of justice.³

The personal acts of judges either in their private capacity or so grossly violative of their judicial functions that they may be held personal acts, do not entail any liability of the government. For their private acts they are liable as other individuals.⁴ It is not always easy to distinguish personal acts from wrongful official acts. The

¹ *Supra*, p. 191, note 1, and cases of Blumhardt, Burn, Smith and Jennings, there cited.

² French indemnity of 1831, Moore's Arb. 4472-73; The Van Ness Convention with Spain, Feb. 17, 1834, *ibid.* 4544.

³ *E. g.*, in Trumbull (Chile) v. U. S., Aug. 7, 1892, Moore's Arb. 3255-61, where claimant was ultimately acquitted of a charge of violating the neutrality laws, it was held that he was not entitled to an indemnity, for he had been "regularly indicted, tried, and acquitted in accordance with the ordinary proceedings of courts of justice, and that he had been subjected to no improper treatment." See also White (Gt. Brit.) v. Peru, award April 13, 1864, Moore's Arb. 4967, at 4968; Ullman, De la responsabilité de l'Etat en matière judiciaire, Paris, 1911 (extract from Lapradelle's and Politis' Recueil des arbitrages, v. II); Forte (Gt. Brit.) v. Brazil, award June 18, 1863, 53 St. Pap. 150, Moore's Arb. 4925; Mr. Webster, Sec. of State, to the President in Thrasher's case, 2 Wharton, 613, and other extracts in 2 Wharton, §§ 230 and 230a.

⁴ Thus the fraud and corruption of a municipal judge were held by Attorney General Akerman in the *Caroline* case against Brazil not to involve the liability of Brazil and the U. S. returned a portion of an indemnity already paid (18 Stat. L. 70); 13 Op. Atty. Gen. 553. See also *Rebecca* (U. S.) v. Mexico, March 3, 1849, Moore's Arb. 3008 (judge fled with money deposited in court).

latter usually involve the liability of the state if they are not remedied by higher courts and result in an actual injury or denial of justice to aliens.¹

As in the case of minor officials and even of individuals, the government must assume liability for such wrongful acts of its judges or courts as it negligently fails to prevent or punish, or against which judicial recourse is closed to the injured individual.² The failure of administrative authorities to execute a judgment³ may be appropriately considered as a denial of justice.

RESPONSIBILITY FOR POLITICAL SUBDIVISIONS OF THE STATE

§ 82. Responsibility of Central Government for its Constituent Parts.

The question is often raised as to whether the central government is liable for the breach of a contract by one of its political subdivisions or for a tort committed by an officer of a constituent state under circumstances rendering that state responsible. In international relations the national government is alone responsible for the proper safeguarding of the rights of foreigners, and aliens have the right to look to the central government in the case of violation of treaty rights and international obligations of the nation by its constituent parts.⁴

¹ *Cotesworth and Powell (Gt. Brit.) v. Colombia*, Dec. 14, 1872, *Moore's Arb.* 2050 at p. 2084, parag. 9 (negligent absence of judge from his official post). *Mr. Seward, Sec'y of State, to Mr. Webb*, Dec. 7, 1867, 2 *Wharton*, 615 (fraudulent decision). In the case of *Meade v. Spain*, Spain acknowledged her liability for the palpable misconduct of her judicial tribunals. *Moore's Arb.* 3238.

² *Jonan (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 3251 (failure of Mexican government to prevent illegal assumption of jurisdiction by its courts, on remonstrance. It is presumed government had the necessary power). *Cotesworth and Powell (Gt. Brit.) v. Colombia*, *Moore's Arb.* 2050, 2085 (condonation of illegal act of judge by an amnesty or pardon, thereby also depriving claimant of all appellate recourse or redress); *Bark Jones (U. S.) v. Great Britain*, Feb. 8, 1853, *Moore's Arb.* 3051 (refusal to investigate an unjust judgment, but on the contrary sustaining it after remonstrance); *Holtzendorff, Handbuch*, II, 74; *Fiore, Dr. int. codifié*, §§ 339, 340; *Calvo*, I, § 348; *Pradier-Fodéré*, I, § 402; *Bluntschli*, § 340.

³ *Montano (Peru) v. U. S.*, Jan. 12, 1863, *Moore's Arb.* 1630, 1634; *Fabiani (France) v. Venezuela*, Feb. 24, 1891, *ibid.* 4878, at p. 4907; *Polak v. Egypt*, 3 *Clunet* (1876), 499.

⁴ *Oppenheim*, 210; *Phillimore*, I, 194; *Triepel*, 359 *et seq.*; *Anzilotti* in 13 *R. G. D. I. P.* (1906), 301 and authorities there cited.

In the matter of contracts entered into with corporate subdivisions of a general government a distinction is recognized, and it has been held that in the absence of a definite benefit to the central government or other factor indicating national liability for the debt, the general government is not liable for contractual debts due from or by its cities, villages or their inhabitants.¹ Especially is this true where the debt is contracted by the municipality or commonwealth in its corporate character as a fiscus for distinctly corporate purposes.² Where, however, there has been some benefit to the general government, or some control over or interest in the contract by the general government, the latter has been held liable for breach of the contract by a constituent state or municipality.³

¹ Thompson (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3484; Nolan (U. S.) v. Mexico, *ibid.* 34-84; La Guiara Light and Power Co. (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 181; Thomson-Houston Co. (U. S.) v. Venezuela, *ibid.* 169 (*dictum*). But see *contra* Ballistini (France) v. Venezuela, Feb. 19, 1902, *ibid.* 503, 506 (no reason given for award).

² Thus, the United States has been held not responsible for the repudiation of state bonds nor a guarantor of their payment (Schweitzer v. U. S., 21 Ct. Cl. 303), nor for the bonds of a territory, although the governor was appointed by the President and Congress failed to disapprove the issue of the bonds or their repudiation. Florida Bond Cases, Gt. Brit. v. U. S., Feb. 8, 1853, Moore's Arb. 3594-3612. Similarly, the U. S. is not liable for the debts [or torts] of officers of a Territory organized under Congressional legislation. (Mr. Bayard to Mr. West, June 1, 1885, For. Rel. 1885, 452.) Mexico was held not liable for the repudiation by Texas of a contract (scrip) representing land in Texas, that state having later seceded from Mexico. Union Land Co. v. Mexico, March 3, 1849, Moore's Arb. 3448, 3451.

³ Participation of the minister of public works in a contract with a municipal council and an exemption from the payment of federal customs duties. Rudloff (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 182, 197. See also Daniel (France) v. Venezuela, Feb. 19, 1902, *ibid.* 507, 509 and Dominique (France) v. Venezuela, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 207 (various degrees of national interest in the contract). Beckman (Germany) v. Venezuela, Feb. 13, 1903, Ralston, 598, 599 (forced loans—quasi-contract—exacted by a constituent state, the proceeds of which were used for the defense of the entire nation). See also Baaseh and Römer (Netherlands) v. Venezuela, Feb. 28, 1903, Ralston, 906 and Bolivar Ry. Co. (Gt. Brit.) v. Venezuela, Feb. 13, 1903, *ibid.* 391; Ballistini (France) v. Venezuela, Feb. 19, 1902, Ralston, 503, 506 (supplies furnished to a constituent state—no reason given for the award); Metzger (U. S.) v. Haiti, Oct. 18, 1899, For. Rel. 1901, 271 (central government had assumed diplomatic negotiations for settlement of claim against municipality; held an agreement binding on government). See also extracts quoted in Ralston's International arbitral law, §§ 457-467.

The international responsibility of the nation or central government for the acts of its political subdivisions or dependencies, such as suzerain and vassal states, protectorates, constituent states under a real or personal union, or federation or confederation of states¹ depends generally upon the extent to which the political subdivision or dependency has constitutionally been deprived of independent international personality. If the central authority undertakes by treaty or otherwise to represent its constituent parts in international affairs, it must discharge the resulting obligations, although constitutionally the fulfillment of many of these duties may in first instance be delegated to the political subdivisions of the nation.² Constitutional arguments do not avail to excuse the non-performance of international duties,³ although the constitutional inability of the United States to compel the states to satisfy the treaty obligations of the nation has often furnished a controversial ground for contesting its legal liability.⁴

The torts committed against aliens by officers or authorities of a political subdivision of a nation, under circumstances which would render the subdivision responsible, generally bind the central government to indemnify the injured alien.⁵ The reason for this, as has

¹ Westlake, I, ch. III; Tchernoff, 188-193. On constituent states see Donot, M., *De la responsabilité de l'état fédéral à raison des actes des états particuliers*, Paris, 1912, p. 100 *et seq.* On protectorates see Hall, *Foreign powers and jurisdiction*, § 96, and Jenkins, H., *British rule and jurisdiction, etc.*, Oxford, 1902, p. 175.

² In a *dictum* by Plumley, Umpire, in *Davy (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *Ralston*, 411, a difference was deduced from the constitutional character of the bond existing between the constituent state and the central government, in the fact that in the case of some countries, *e. g.*, Venezuela, where the states are carved out of the national domain and formed in accordance with the national wishes, the federal government is held to more direct responsibility for the acts of its constituent states than in the case of a country like the United States where the federal government merely has delegated powers, sovereignty being reserved in the separate states.

³ Lord Clarendon to Mr. Erskine, April 21, 1870, 65 St. Pap. 669, *Baty*, 152 (case in Greece); Speech of Senator Edmunds, June 3, 1886, *Cong. Record* v. 17, part 5, p. 5186; Mr. Fish, Sec'y of State, to Mr. Partridge, March 5, 1875, *Moore's Dig.* VI, 816 (case in Brazil); *De Brissot (U. S.) v. Venezuela*, Dec. 5, 1885, *Moore's Arb.* 2949-2967; *Trumbull (Chile) v. U. S.*, Aug. 7, 1892, *ibid.* 3569. See article by Despagnet, "Les difficultés venant de la constitution de certains pays," 2 R. G. D. I. P. (1895), 181 *et seq.*

⁴ Generally without success. See *infra*, § 91.

⁵ Little, Commissioner in *De Brissot and Rawdon case (U. S.) v. Venezuela*, Dec. 5,

already been observed, is that the state is a unit in its international relations; and in view of the inability of a constituent political subdivision of the state to commit an international delinquency on its own responsibility alone, the parent government is bound to answer for it.¹

§ 83. Succession of States and Apportionment of Debts.

The matters connected with the distribution of public obligations in the case of the division of a state into distinct states, or the cession of a portion of one state to another have engaged the attention of numerous writers without having led to any definite conclusion except that no universal rule of international law on the subject can be said to exist.²

1885, Moore's Arb. 2949, 2967; Davy (Gt. Brit.) *v.* Venezuela, Feb. 13, 1903, Ralston, 411; Torreny (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 162 (local police officer); Jones (U. S.) *v.* Mexico, March 3, 1849, Moore's Arb. 3019 (illegal detention of vessel by governor of a state); *Montijo* (U. S.) *v.* Colombia, Aug. 17, 1874, Moore's Arb. 1421, 1443; Dominique (France) *v.* Venezuela, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 206 (municipality). See also Knapp and Reynolds claims, Moore's Dig. VI, 800 (connivance of local authorities in brigandage).

¹ It is on this theory that the United States has on several occasions felt itself constrained to award indemnities to aliens injured under circumstances rendering the states responsible for the injury. Foreign governments are not compelled to look to the constituent states for the vindication of the treaty rights of their nationals, and the inability of the federal government to compel the states to observe these rights or make reparation for their violation lays the foundation for the liability of the United States. Presidents Harrison, McKinley, Roosevelt and Taft and the authors of numerous bills introduced in Congress to give the federal courts jurisdiction over offenses against aliens, considered the police and judiciary of the state in such cases as federal agents. See *infra*, p. 226 (mob violence) and footnote 1. In this respect, the constitutional inability operates in the same way as a negligent failure to bring local officers to justice. *De Brissot and Davy cases*, footnote 1, *supra*.

If local officers depend for their authority on the central government, they may be considered government agents. *Baasch and Römer (Netherlands) v. Venezuela*, Feb. 28, 1903, Ralston, 906.

² The details of this exceedingly interesting subject, which may become of renewed importance at the conclusion of the present European War, can hardly be discussed here. It is a very complicated subject, and precedents depend so largely upon the special facts and circumstances of each case, that conclusions of principle are not easily deducible. The ablest discussions of the subject, involving the transmission and divisibility of obligations arising out of public debts, general and local, and out of contracts and concessions will be found in Westlake, I, 58 *et seq.*; Keith, Arthur B. The theory of state succession, London, 1907, ch. VIII; Huber, Max, *Die Staaten-succession*, Leipzig, 1898, § 125 *et seq.*; Schönborn, W., *Staaten-successionen*, in *Handbuch des Völkerrechts*, II, 2, Stuttgart, 1913, pp. 55-60, 80-84, 96-109, 113,

As a general rule, however, it may be said that the state, through all changing forms of government,¹ is responsible for the debts of its titular government and even of general *de facto* governments. Public debts are not extinguished by the division of a state into distinct states, whether by war or by mutual consent.² According to the weight of authority among international law writers, however, there appears to be no legal obligation on the part of a seceding province or on the part of a country taking over a certain portion of territory from another country to assume some share of the national debt *when the identity of the parent state is maintained*.³ They recognize, however, a moral obligation to assume a proportionate share of the general debt of the parent government which has been incurred for the benefit of the entire country.⁴ Many of the continental writers supported by the evidence of numerous treaties, erect the moral obligation into a legal one, whereas the Anglo-American publicists—possibly influenced by the fact that their countries have been annexing and conquering countries—and in turn supported by various treaties, such as the treaties following the Franco-Prussian War of 1871 and the Spanish-American War of 1898, and the treaties of cession of Louisiana, Florida, New Mexico and California, assert vigorously the merely moral character of the obligation. Moreover, no uniform rule for the apportionment of the debt has ever been agreed upon,⁵ a further evidence of the non-legal

117-118; Appleton, H., *Des effets des annexions de territoires sur les dettes*, etc., Paris, 1894 (part 2 of a doctoral dissertation); and Cavaglieri, Arrigo, *La dottrina della successione de stato a stato*, etc., Pisa, 1910, ch. II, § 11, p. 89 *et seq.*; see also Moore's Dig. I, § 96 *et seq.*

¹ Westlake, I, 58; Oppenheim, I, 122; Halleck, I, 96. See also Zouche, Brierly's trans., § 66, in which Aristotle's contrary view is cited. The rule of the text, which was favored by Grotius, II, 9, § 3, is now uniformly adopted. Moore's Dig. I, 249 *et seq.*; Bolivar Ry. Co. (Gt. Brit.) v. Venezuela, Feb. 17, 1903, Ralston, 394; Neapolitan Indemnity, convention of October 14, 1832, Moore's Arb. 4579. For *de facto* governments see *infra*, p.

The U. S., as a military occupant, however, was not liable for the debts of Cuba. Griggs, Atty. Gen., 22 Op. Atty. Gen. 384.

² Hall, 91, 92. Case of the ship *Tarquin* (U. S.) v. Brazilian Indemnity, Jan. 24, 1849, Moore's Arb. 4617.

³ Hall, 92; Oppenheim, 129, and authorities cited; Magoon's Reports, 189, 190.

⁴ Oppenheim, 130, 131; Hall, 92; Keith, *op. cit.*, 60 *et seq.*, and authorities cited.

⁵ See different principles set forth by Huber, *op. cit.*, § 134.

character of the obligation. In the case of a debt raised for the purposes of the ceded territory or charged upon its local revenues, it is held by the majority of writers, who cite numerous treaties in support, that the obligation passes with the land to its new owners.¹ While reason and authority favor this rule, it is not altogether certain that the annexing state contracts a legal obligation to pay the debts secured upon local revenues, and it is fair to conclude that it is not bound to pay war debts contracted by the conquered state or province for the very purpose of resisting conquest and annexation. Nor is a new independent state split off from a parent state legally obliged to assume any share of the debts of the parent state, although some of them may have been incurred in its special behalf. Thus, the American colonies in 1783 assumed no part of the general debt of Great Britain; on the other hand, the Spanish-American colonies practically all undertook to pay a portion of the debt of Spain.²

According to strict principles of international law, the parent state which has lost a province by conquest or cession, remains liable for all but local debts of the transferred province contracted for local purposes. On equitable grounds, a reduction of the debt has, at times, been allowed by creditor governments, especially when the debt was incurred through the separated province.³ Where the identity of the parent state is destroyed, the conquering or annexing power or the new state becomes

¹ This was one of the contentions in the Hodgskin and Landreau claims *v.* Chile both diplomatically and before the arbitral tribunal under convention of Aug. 7, 1892. The right of claimants to certain guano deposits in Peru was in question. It was contended that the obligation of Peru passed to Chile on the cession of the guano territory. The Tribunal (Goode, U. S. commissioner, dissenting) held that the claim was personal only against Peru, and did not pass with the land. Moore's Arb. 3571-3590. In the diplomatic correspondence, the U. S. seems to have contended that the satisfaction of the Peruvian obligations, pledged upon the transferred guano deposits, was a moral obligation of Chile. This is the better view, but Westlake (I, 63, 1st ed.) believes the obligation to have been legal. Westlake here adopts the view of the continental writers. See Keith, *op. cit.*, 60, 63. See claims of France *v.* Chile, July 23, 1892 (Award, July 5, 1901), Descamps & Renault, *Rec. int. des traités du xx^e siècle*, 1901, p. 188 *et seq.* In support of the text, see also Hall, 92. Magoon's Reports, 178, 189. See extracts in Moore's Dig. I, 339 *et seq.*

² Moore's Dig. I, 342-343.

³ Claim of Chilean S. S. *Lautardo v.* Colombia, reduced by a third after secession of Panama, which had been responsible for the original wrong. For. Rel. 1907, I, 293.

heir to the debts of the destroyed country.¹ The ceded or seceding territory, however, is liable for local debts,² although, as observed, there is much difficulty in establishing what is a local debt. It has been noted that a general debt, even when made a lien upon local revenues, is not a local debt and an obligation *in rem*. A local debt is one incurred only for strictly local purposes, and is the only one which carries to the annexing state or new state created, a legal obligation to pay. It is important in all cases to establish whether the debt has been contracted for local or for national purposes.³

It is stated by practically all the authorities that the annexing state becomes liable for all the concessions and contracts of the annexed state. For this view, they find support in numerous treaties and court decisions. Nevertheless, the fact that bankrupt states could thus impose enormous obligations on their successors, and that war debts would thus legally have to be paid, weakens to such an extent the force of the contention, that it may with justice be said that the successor is bound to satisfy only such contractual and other obligations of the annexed state as appeal to him as fair and reasonable, equitable considerations, however, dictating the maintenance of all obligations not founded in fraud or against the public interest.⁴

DE FACTO GOVERNMENTS

§ 84. Different Kinds. Transmission of Obligations.

The internal political changes which a state may undergo do not affect its international personality. In the rapid change of government to which some states have been subject, certain parties have secured control and exercised the powers of government, without compliance with constitutional or strictly regular forms. This control may extend over the entire nation or over certain parts only. It becomes important then to determine when such control of the administration may be said to have become a *de facto* government, and to

¹ Oppenheim, 129; Hall, 99; Halleck, 98; Dana's Wheaton, note 18.

² Oppenheim, 131; Hall, 92; 23 Op. Atty. Gen. 187.

³ Magoon's Rep. 190; 23 Op. Atty. Gen. 187. The authorities are unsatisfactory on many of the points here discussed. See footnote in Hall, 93-94.

⁴ The ablest discussion of this matter has been found in Keith, *op. cit.*, 66-72.

what extent the acts of such a provisional government are binding upon the nation.¹

It is necessary first to distinguish between the powers of a *de facto* government which has displaced the *de jure* government within the whole or practically the whole nation, as, *e. g.*, the government of Cromwell, of Napoleon I, and of the Republic of 1848 in France, and a *de facto* government which controls only a limited portion of the national territory, as the Confederate government did in the United States. The former may be called a "general" *de facto* government, which resembles closely a lawful government, and the latter, a "local" *de facto* government or government of paramount force. The legal consequences of this distinction are important.²

A general government *de facto*, having completely taken the place of the regularly constituted authorities in the state, binds the nation. So far as its international obligations are concerned, it represents the state. It succeeds to the debts of the regular government it has displaced, and transmits its own obligations to succeeding titular governments.³ Its loans and contracts bind the state, and the state is responsible for the governmental acts of the *de facto* authorities. In general, its treaties are valid obligations of the state. It may alienate the national territory, and the judgments of its courts are admitted to be effective after its authority has ceased. An exception to these rules has occasionally been noted in the practice of some of the states of Latin-America, which declare null and void the acts of a usurping

¹ Rougier, A., *Les guerres civiles et le droit des gens*, Paris, 1903, 481 *et seq.*; Wiese, C., *Le droit international appliqué aux guerres civiles*, Lausanne, 1898, 235 *et seq.* If the *de jure* successor of such a *de facto* government is the government the latter has itself displaced, it is then known as the "intermediary" government. See also Moore's Dig. I, 41 *et seq.*; Ralston, *International arbitral law*, §§ 430, 448-456; and Gaudu, Raymond, *Essai sur la légitimité des gouvernements dans ses rapports avec les gouvernements de fait*, Paris, 1914.

² *Williams v. Bruffy*, 96 U. S. 176, 186; *Thorington v. Smith*, 8 Wall. 1, 8-10.

³ The Neapolitan Indemnity Oct. 14, 1832, Moore's Arb. 4575-4589. (Two Sicilies admitted liability for acts of Murat's government.) Treaty of July 4, 1831 between U. S. and France admitted liability of France for acts committed during the Empire. See Wiese, *op. cit.*, 246; *Miller (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2974; *Republic of Peru v. Dreyfus*, L. R. 38 Chancery Div. 348, and particularly decision of Franco-Chilean Tribunal of Arbitration in Lausanne, 1901, in claim of Dreyfus Bros, Descamps and Renault, *Rec int.*, etc., 1901, 396-398.

de facto intermediary government when the regular government it has displaced succeeds in restoring its control.¹ Nevertheless, acts validly undertaken in the name of the state and having an international character cannot lightly be repudiated, and foreign governments generally insist on their binding force.² The legality or constitutional legitimacy of a *de facto* government is without importance internationally so far as the matter of representing the state is concerned.³

The responsibility of the state for the acts of a local *de facto* government involves more delicate questions. Such a local government *de facto* may be maintained by military force within a portion of a larger territory, either as an enemy making war against the invaded nation—a military occupant—or as a revolutionary organization resisting the authority of the legitimate government or of other factions contending for national control. The power of such a *de facto* government to involve the responsibility of the state depends largely upon its ultimate success, so that most of its international acts, *e. g.*, treaties, etc., are affected with a suspensive condition. Nevertheless, even if it fails, definite executed results follow from its merely temporary possession of administrative control within a defined area. These may be considered briefly.

A temporary occupant or local *de facto* government carries on the functions of government, supported usually directly or indirectly by military force.⁴ It may appoint all necessary officers and designate their powers, may prescribe the revenues to be paid and collect them,

¹ Wiese, *op. cit.*, 244 *et seq.* We cannot enter into any detailed discussion of the various kinds of governmental acts which survive the downfall of a usurping *de facto* government. This is largely a question of constitutional law. Pradier-Fodéré, I, § 134.

² Thus Peru, notwithstanding art. 10 of its Constitution and its law of 1886, declaring void the acts of the usurper Pierola, was held liable on contracts which he had made. *Dreyfus (France) v. Chile*, July 23, 1892 (award July 5, 1901), Descamps and Renault, *Rec. int.*, etc. 1901, 396-398.

³ Bluntschli, §§ 44, 45, 120; Holtzendorff, II, § 21; Pradier-Fodéré, §§ 134, 149; Rivier, II, 131, 440; Rougier, 481; *Dreyfus (France) v. Chile*, Franco-Chilean Arbitration, Lausanne, p. 290, and authorities there cited, and Gaudu, *op. cit.*

⁴ Moore's Dig. I, 45 *et seq.*; VII, 257 *et seq.*; 2 Op. Atty. Gen. 321; 9 *ibid.* 140; Magoon's Reports, 11 *et seq.*; Hall, part 3, chap. IV; Oppenheim, 204 *et seq.*; Bordwell, P., *Law of war*, Chicago, 1908, ch. VIII and IX; Spaight, J. M., *War rights on land*, London, 1911, ch. XI and XII.

and may administer justice.¹ Foreigners must perforce submit to the power which thus exercises jurisdiction, and a subsequent *de jure* government cannot expose them to penalties for acts which were lawful and enforced by the *de facto* government when done. The temporary *de facto* government may legislate on all matters of local concern, and in so far as such legislation is not hostile to the subsequent *de jure* government which displaces it, its laws will be upheld.² A military occupant as a general rule is forbidden to vary or suspend laws affecting property and private personal relations or which regulate the moral order of the community. If he does, his acts in so doing cease to have legal effect when the occupation ceases. Political and administrative laws are subject to suspension or modification in case of necessity.³

The collection of taxes and customs duties within the territory and during the period of occupancy or of the local *de facto* government relieves merchants and taxpayers from the obligation of a subsequent second payment, upon the same goods, to the succeeding *de jure* government.⁴ Such a temporary government may levy contributions on the inhabitants for the purposes of carrying on the war, but they must not savor of confiscation. It may seize property belonging to the state and may use it. It may receive money due the state and give receipts in the name of the state.⁵ This applies only to debts payable within the territory and period of occupancy.

Debts due *by* the state cannot be confiscated or the interest sequestered by a temporary occupant,⁶ and private property must be respected. The occupant or local *de facto* government cannot alienate

¹ The German legislation for the occupied territories of Belgium has been collected and edited by C. H. Huberich and A. Nicol-Speyer. The Hague, Nyhoff, 1915. 108 p.

² *Bruffy v. Williams*, 96 U. S. 176, 185; *U. S. v. Home Ins. Co.*, 22 Wall. 99; *Sprott v. U. S.*, 20 Wall. 459, 464. But the *de jure* government which ousts a usurping *de facto* government (*e. g.*, the Confederates) may disregard all its acts which contributed to its support, except that it cannot collect taxes and duties a second time.

³ Hall, 475-476.

⁴ *U. S. v. Rice*, 4 Wheaton, 246; *Mazatlan and Bluefields cases*, Moore's Dig. I, 49 *et seq.*; Cases in U. S. Civil War and in Colombia, *ibid.* VI, 995-996. Message of the President, For. Rel. 1900, xxiv; *MacLeod v. U. S.* (1913), 229 U. S. 416, 429.

⁵ Magoon's Reports, 261, citing Phillimore and Halleck.

⁶ Moore's Dig. VII, 306 and authorities cited in note, p. 308.

any portion of the public domain.¹ The fruits thereof may be sold, but only that part accruing during the period of occupancy.² A local *de facto* government may become the owner of movables, which it may sell and hypothecate. A succeeding government takes such mortgaged property as rightful owner, subject to the liens thus created in good faith.³ As a general rule, however, a succeeding *de jure* government is not liable for debts contracted by a displaced local *de facto* government.⁴

A person dealing with a local *de facto* government assumes the risk of his enterprise. The *de facto* government may issue paper money, and private contracts stipulating for payment in such money will be enforced in the courts of the succeeding *de jure* government.⁵ Under compulsion, a government has at times admitted liability for the wrongful acts of previous local *de facto* governments.⁶

Having in a general way described the differences between a general and a local *de facto* government and their power to transmit responsibility, it is now necessary to examine the criteria of a *de facto* government, and the legal results of one of them in particular, namely, recognition by the claimant's own government.

¹ *Coffee v. Groover*, 123 U. S. 1; *Georgiana and Lizzie Thompson (U. S.) v. Peru*, Moore's Arb. 1595, 4785; *Munford v. Wardwell*, 6 Wall. 423, 425.

² *Georgiana and Lizzie Thompson claim (U. S.) v. Peru*, *supra*. Art. 55 of the Hague Regulations provides that a military occupant shall be regarded as the administrator and usufructuary of the public buildings of the state. See Maccas, *Salonique occupée et administrée par les Grecs*, 20 D. I. R. G. P. (1913), 207-242.

³ *U. S. v. Prioleau* (1865), 35 Law Jour. Chancery Rep. N. S., 7; *U. S. v. McRae* (1869), L. R. 8 Equity, 69; *Hallett v. The King of Spain*, 1 Dow and Cl. 169; *The King of the Two Sicilies v. Wilcox*, 1 Sim N. S. 332. But see *Barrett (Gt. Brit.) v. U. S.*, May 8, 1871, Hale's Rep. 153, Moore's Arb. 2900, where it was held that Confederate cotton, seized by the U. S., was not subject to a lien created by contract between claimant and the Confederate states.

⁴ Don Miguel loan of 1832 was not binding on Portugal. Rougier, 523.

⁵ *Thorington v. Smith* (1868), 8 Wall. 1, 9 (contract made on a sale of property, and not in aid of the rebellion); *Hanauer v. Woodruff*, 15 Wall. 439, 448. As to the general effect of the acts of the Confederate government, see *Baldy v. Hunter*, 171 U. S. 388, 400.

⁶ *E. g.*, Lord J. Russell made his recognition of the Juarez government in Mexico conditional upon the admission of responsibility for the acts of the Miramon and Zuloaga governments. Lord J. Russell to Sir C. Wyke, March 30, 1861, 52 St. Pap. 237, Moore's Arb. 2906.

§ 85. Criteria of De Facto Government. Effect of Recognition.

The existence of a *de facto* government is a question of fact. Tests in establishment of this fact are the possession of supreme power in the district or country over which its jurisdiction extends,¹ the acknowledgment of its authority by the people or the bulk of them by their rendering it habitual obedience "from fear or favor,"² and finally the recognition of the government as *de facto* by foreign governments.³ While each of these tests is persuasive, none of them alone is conclusive, except as recognition or failure to recognize by the claimant's own state may operate as an estoppel.

In municipal courts, recognition in fact by the political department of the government is essential to judicial notice of the *de facto* character of a foreign provisional government.⁴ In one case at least, it has been held that such act or failure to act by the government was not binding on an international tribunal.⁵ The burden of proving that a particular government is a government *de facto* rendering the nation responsible falls upon the claimant.⁶ It has been held in several cases that recognition, while important as evidence, does not create a *de facto* government,⁷ nor is such recognition conclusive of its existence in fact. The failure of the United States, however, to recognize certain foreign

¹ *Mauran v. Insurance Co.*, 6 Wall. 1; *Nesbitt v. Lushington*, 4 Term. 763.

² Opinion of Wadsworth, Commissioner in *McKenny (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2882. But a local *de facto* government generally controls by force and not favor. See also *U. S. v. Price*, 4 Wheat. 253, and citations from Austin and Halleck in the case of Day and Garrison (*U. S.*) *v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3553-54 and *Henriquez (Netherlands) v. Venezuela*, Feb. 28, 1903, Ralston, 899. See also Janson (*sic* in original) *v. Mexico*, July 4, 1868, Moore's Arb. 2902, 2930 and *dictum* by Wadsworth in *Cucullu (U. S.) v. Mexico*, *ibid.* 2877.

³ *Thorington v. Smith*, 8 Wall. 1, 9.

⁴ *City of Berne v. Bank of England*, 9 Vesey, 347; *The Manilla*, 1 Edw. Adm. 1; *Rose v. Himely*, 4 Cranch, 241; *Gelston v. Hoyt*, 3 Wheat. 246, 324; *U. S. v. Palmer*, 3 Wheat. 644.

⁵ *Jarvis (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 150. See also Day and Garrison (*U. S.*) *v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3560 (although it was considered an important element in arriving at the fact).

⁶ Day and Garrison (*U. S.*) *v. Venezuela*, *supra*.

⁷ *Cucullu (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2873, 2877; *McKenny (U. S.) v. Mexico*, *ibid.* 2883 (recognition of Zuloaga government in Mexico by U. S. Minister and other foreign ministers held not to establish its *de facto* character as a fact); *Jarvis (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 150.

governments as *de facto*, has been held binding upon its own citizens and to estop them from asserting rights based upon the *de facto* character of the government in question.¹ It will be noticed hereafter (*infra*, p. 235) that the recognition of the belligerent character of a revolutionary movement releases the legitimate government from liability to the subjects of the recognizing power for the acts of the revolutionists.

While international commissions have held almost uniformly that only a *general de facto* government can involve the responsibility of the state,² it was held in one case,³ which has been sharply criticized⁴

¹ *Jarvis (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 150 (the Paez Government in Venezuela); *Janson (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2902 (the Maximilian government in Mexico); *Schultz (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2973 (recognition of Juarez government by U. S. estopped claimant from asserting Miramon government as the *de facto* government of Mexico).

A question has been raised whether the acts of the Huerta government in Mexico are binding on Mexico, and hence upon the Carranza or other government which may ultimately be established. Huerta's government having been at least a *general de facto* government—it was indeed recognized as the *de jure* government by various European powers—its acts normally bind the nation. But the further question arises whether a declaration of the President of the United States to the effect that "he will not recognize as legal or binding anything done by Huerta since he became Dictator," *i. e.*, subsequent to Huerta's dissolution of the Mexican Congress and the arrest of certain deputies, October 10, 1913, has any effect upon the international obligations of Mexico, or operates as an estoppel upon citizens of the U. S. to whom Huerta's government incurred obligations subsequent to October 10, 1913. As against foreign governments, it would seem that the alleged statement of the President does not alter the obligations of the Mexican nation under general principles of international law. As regards citizens of the U. S., it is very doubtful whether Mexico can avail itself of any such declaration to escape obligations properly incurred and due by the nation or its authorities under recognized principles. On Mexican loans, see note by Thomas Baty in 39 *Law Mag. & Rev.* (1914), 470.

² *Day and Garrison (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3548, 3553 (*dictum*); *Henriquez (Netherlands) v. Venezuela*, Feb. 28, 1903, Ralston, 889.

The acts of local *de facto* government were held not to bind the state in *Georgiana* and *Lizzie Thompson (U. S.) v. Peru (supra)*, and in the Don Miguel loan.

Again, *e. g.*, Mexico was held not responsible for the acts of the Maximilian government: *Janson (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2902; *Stückle, ibid.* 2935; *Baxter, ibid.* 2934. Nor for those of the Zuloaga and Miramon governments: *Cueullu, ibid.* 2873; *McKenny, ibid.* 2881 and cases cited p. 2885. Nor U. S. for acts of the Confederate states, *Prats (Mexico) v. U. S., ibid.* 2886.

³ *Baldwin (U. S.) v. Mexico*, April 11, 1839, Moore's Arb. 2859–2866, where the

⁴ Lapradelle and Politis, *Recueil des arbitrages*, I, 466–467.

that the state was responsible for the wrongful acts of a local *de facto* government.

wrongful acts of a "junta" established for six months in a state of Mexico were held to render Mexico responsible.

See also Central and South American Telegraph Co. (U. S.) *v.* Chile, Aug. 7, 1892, Moore's Arb. 2938, 2942 (where a local *de facto* government was held entitled to take advantage of a concession permitting the "government" to suspend a cable service).

CHAPTER V

INTERNATIONAL RESPONSIBILITY OF THE STATE—Continued. ACTS OF INDIVIDUALS

§ 86. Obligations of the Government.

Private individuals are in no sense authorities of the state. For this reason, their acts do not involve the international responsibility of the state unless the latter by some independent delinquency of its own may be charged with a violation of its international obligations. The first of these obligations in so far as it affects the present subject is to furnish legislative, administrative and judicial machinery which normally would protect the alien against injuries to his person or property by private individuals.¹ This does not mean that the governmental machinery of the state must be so efficient as to prevent all injury to aliens—for this would make of the state a guarantor of the security of aliens—but simply that its legislation, its police, and its courts, whatever the form of government, must be so organized that a violent act by one private individual upon another is only a fortuitous event and that the judicial channels for legal recourse against the wrongdoer are freely open. A second and subsidiary duty, a default in which has often served to fasten responsibility upon the state, is the use of due diligence to prevent the injury, and in a criminal case the exertion of all reasonable efforts to bring the offenders to justice.²

¹ Grotius, II, ch. 21, § 2; Vattel, liv. II, ch. VI, §§ 71-73; Hall, 215-218; Oppenheim, I, 221; Phillimore, I, 218; Halleck, ch. XIII, § 6; Moore's Dig. VI, §§ 1019-1021; Calvo, § 1271; Pradier-Fodéré, § 202; Fiore, §§ 669-673; Anzilotti in 13 R. G. D. I. P. (1906), 14, 298; 27 Law Mag. and Rev. (1901), 337; Pradier-Fodéré's statement (I, 336) that the state is responsible "if it refuses to repair the damage caused by one of its subjects" is inaccurate. A useful contribution to the subject is made by Georg Muszack, Ueber die Haftung einer Regierung für Schäden, welche Ausländer . . . gelitten haben, Strassburg, 1905, p. 37 *et seq.*, and by R. E. Curtis, The law of hostile military expeditions, reprinted from 8 A. J. I. L. (1914), 1-37, 224-255.

² The apprehension and punishment of the offender has been held to release the government from liability on several occasions: Duvall claim *v.* Mexico, Mr. Gresham,

It is a fundamental principle that the legislation of a state must be such as to enable it to fulfill its international duties. Its law must impose penalties upon the violation by individuals—natives, residents or aliens—of the international obligations of the state. Thus Great Britain in the “Alabama” case could not plead the insufficiency of its legislation on neutrality to escape liability to the United States for the violation by private individuals of British neutrality.¹

More uncertain questions are the measure of local protection which must be afforded and the tests of state negligence in preventing a private injury. In normally well-ordered states government liability is measured by the ability to protect the injured person in a given case.² The nature of the case is all important. Thus, if the moving cause of the injury is notorious, *e. g.*, bandits in a certain locality,³ a greater degree of protection is incumbent upon the government than in cases of sudden violence which the best organized government could not foresee. Commissioner Wadsworth in the Mills case before the United States-Mexican commission of 1868 expressed the opinion that the test of a nation’s responsibility for injuries committed upon aliens in its territory by private persons is the enforcement of the laws “with reasonable vigor and promptness to prevent violence when practicable, or failing in that to punish the offenders criminally, and to indemnify

Sec’y of State, to Mrs. Robinson, Sept. 20, 1894, Moore’s Dig. VI, 806; Harwood claim (Gt. Brit.) *v.* Austria, 1852, 44 St. Pap. 236; Assassination of Servian Vice-Consul at Pristina, Turkey, 1890, Baty, 224.

A notice to aliens of special circumstances rendering it dangerous to visit certain portions of its territory, would seem to release the state from liability for the happening of the events against which they were warned. Comments on Miss Stone’s capture by brigands in Turkey, 1901; 27 Law Mag. and Rev. (1901), 337.

¹ Nor could the United States in the New Orleans riot case of 1891 escape liability because the Constitution gave the federal government no means to compel states to prosecute offenders against aliens. See also Baldwin (*U. S.*) *v.* Mexico, April 11, 1839, Moore’s Arb. 2863, and *infra*, p. 226.

² Bowley (*U. S.*) *v.* Costa Rica, July 2, 1860, Moore’s Arb. 3032; Calvo, § 1274, makes the “facilities at hand” the test of responsibility. Mr. Hay, Sec’y of State, to Mr. Dudley, min. to Peru, Sept. 5, 1899, Moore’s Dig. VI, 806. But the apprehension and punishment of the guilty will be demanded.

In weaker states like China and Morocco, the rule of ability to protect as a test of liability has often been held, by strong claimant governments, not to prevail.

³ Baldwin claim *v.* Mexico, 1887, Moore’s Dig. VI, 802.

the injured party by [its] remedial civil justice." ¹ A preliminary demand for adequate police protection, therefore, is considered as laying the foundation for a claim for redress of injuries in case it is not afforded.²

The general rule that in the absence of governmental complicity (the particular manifestations of which will be examined presently), the government is not responsible for the wrongful acts of private individuals which it could not prevent, has been reiterated on numerous occasions by international tribunals and by the Department of State.³

In a number of cases occurring in the more poorly organized countries like China, Turkey, Morocco and formerly Greece and a few other states, the government has been held liable for the acts of private persons even in the absence of governmental complicity, apparently regardless of principle, but presumably on the ground that an indifferent police protection and enforcement of the laws invited disorder and constituted in itself an international delinquency. In other words, liability is predicated on the *failure* to prevent the injury, regardless of *ability* to prevent it. This practice overlooks the principle that an alien visiting unstable countries assumes a certain measure of risk, and compels the weaker nations, like China and Morocco, to assume a certain degree of guaranty for the safety of aliens.⁴ By treaty, some of

¹ Mills (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3034. See also Fiore, § 670.

² Mr. Bacon, Act'g Sec'y of State, to Mr. Leishman, July 2, 1907, For. Rel., 1907, II, 1072-1073.

³ Thus the government has been held not liable for acts of private persons in the following cases: Wipperman (U. S.) *v.* Venezuela, Dec. 5, 1885, Moore's Arb. 3041 (pillage by savages); Dickens (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 3037 and Garza, *ibid.* 3038 (raiding bands); Mills (U. S.) *v.* Mexico, *ibid.* 3034 (private assault); Poston, *ibid.* 2998 and Sagardia claim, Magoon's Reports, 471 (thieves); Lovett (U. S.) *v.* Chile, Aug. 7, 1892, Moore's Arb. 2990 (revolted convicts); Molière (U. S.) *v.* Spain, Feb. 12, 1871, *ibid.* 3252 (private quarrel); Sumpter (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 3038 (marauding Indians); Dorris (U. S.) *v.* Mexico, *ibid.* 3003 (private scuffle between enraged soldiers); Johnson (U. S.) *v.* Mexico, March 3, 1849, *ibid.* 3031 and Duvall claim *v.* Mexico, Mr. Gresham to Mrs. Robinson, Sept. 20, 1894 (robbery by highwaymen); 1 Op. Atty. Gen., March 11, 1802 (unlawful captures by individuals). Mr. Hay, Sec'y of State, to Mr. Fowler, April 15, 1899, Moore's Dig. VI, 792 (piratical acts of Haitian citizens).

⁴ Numerous cases of private murder of aliens in China, reported in For. Rel. 1880 *et seq.* Japanese subjects murdered in China, 1874, Moore's Arb. 4857; Dreyfus,

the weaker states have occasionally undertaken—or been compelled to undertake—the “special protection” of nationals of certain countries, which has been construed as analogous to a quasi-guaranty of the security of aliens.¹

Where the offense is committed against the representative of a foreign state, either the head of the state, a public minister, or even a consul, all of whom enjoy a certain special protection, the government has on occasion been held immediately liable for the wrongful acts of private persons.²

It may be said that governments occasionally as a matter of policy and equity cause reparation to be made for the injuries committed by their subjects upon aliens.³ This is especially true in the case of riots directed against particular classes of aliens, for which acts of violence the United States has on numerous occasions granted indemnities as a matter of grace, while denying legal liability.

Arbitrage international, 176, 177; Lieut. Cooper claim (Gt. Brit.) *v.* Turkey, 1888, 81 St. Pap. 178; *Caldera* (U. S.) *v.* China, Nov. 8, 1858, Moore's Arb. 4629; Hubbell *v.* U. S., 15 Ct. Cl. 546 (based principally on treaty obligation); *Russia v. Turkey*, 1826 (Turkey held liable for depredations of Moorish pirates), 13 St. Pap. 899, 16 St. Pap. 647, 657. Five cases of British subjects injured in Greece, about 1850, by acts of individuals, *Baty*, 116–118; *Marcos v. Morocco*, 1900, 28 Clunet (1901), 205. Murder of Italian soldier in Crete, 1906, 1 A. J. I. L. (1907), 158; 13 R. G. D. I. P. (1906), 223; *Montijo* (U. S.) *v.* Colombia, Aug. 17, 1874, Moore's Arb. 1421 *et seq.* (absence of power considered equivalent to omission to use it). Turkey and Morocco held responsible for acts of pirates from their shores on three occasions, 12 R. G. D. I. P. (1905), 563–565. “Insufficiency of the protective measures afforded,” an alleged ground of liability in certain cases in Turkey, *For. Rel.*, 1897, p. 592.

¹ Panama riot claims, treaty of 1846 with New Granada, Moore's Arb. 1361. Treaty of 1831 with Mexico, *Baldwin* (U. S.) *v.* Mexico, April 11, 1839, *ibid.* 2859, 2863; *Montijo* (U. S.) *v.* Colombia, Aug. 17, 1874, *ibid.* 1421, 1444; Lawrence's Wheaton, note 59.

² Attacks on German consulate in Havre, 1888, in Messina, 1888 and in Warsaw, 1901, 16 Clunet (1889), 250. French and German consuls murdered in Salonica, 1876, 67 St. Pap. 917; Moore's Dig. V, § 704, discusses cases in Venezuela, Peru, Nicaragua, Santo Domingo and U. S. See the following authorities: Vattel, Chitty's ed., Bk. IV, ch. VI, § 75, p. 460; Phillimore, II, § 246, p. 263; Pradier-Fodéré, IV, § 2108. *For. Rel.*, 1901, 534. See also *infra*, p. 223.

But see case of Servian Vice-consul assassinated in Turkey, 1890, *Baty*, 224 and Wipperman (U. S.) *v.* Venezuela, Dec. 5, 1885, Moore's Arb. 3041, which were not taken out of the general rule of non-liability.

³ 1 Op. Atty. Gen. 106, March 11, 1802.

§ 87. Factors Imposing Liability upon the Government.

A long line of cases has established certain qualifications upon the non-liability of the government for the wrongful acts of private individuals. These consist in certain manifestations of the actual or implied complicity of the government in the act, before or after it, either by directly ratifying or approving it, or by an implied, tacit or constructive approval in the negligent failure to prevent the injury, or to investigate the case, or to punish the guilty individual, or to enable the victim to pursue his civil remedies against the offender.¹ The claimant ordinarily has the burden of proving the negligence of the government.²

The direct ratification or authorization of a private wrongful act is an infrequent occurrence, yet several awards have been made on this ground.³

The failure of a government to use due diligence to prevent a private injury is a well-recognized ground of international responsibility.⁴ The state is thus responsible for every injury which by the exercise of reasonable care it could have averted. What is "due diligence" in a given

¹ See particularly the cases of *Mills*, *Dickens* and *Wipperman* cited in footnote 3, page 215.

² *Mills* and *Dickens* cases, cited *supra*.

³ Wrongful seizures sanctioned by French civil, military or judicial authorities, Kane's notes on questions . . . under convention with France, July 4, 1831, *Phila.*, 1836, p. 31. Authorization or ratification of private acts generally has a political reason, but while it usually releases the individual from liability, it imposes liability on the state. *McCord v. Peru*, Moore's Dig. VI, 989. See *McLeod's case*, Hall, 306; Moore's Dig. II, 24, 409; VI, 261. *Piedras Negras claims (Mexico) v. U. S.*, July 4, 1868, Moore's Arb. 3035 (U. S. protected certain raiders into Mexico by its regular army).

⁴ *Grotius*, liv. II, ch. 17; *Hubbell et al. v. U. S.*, 15 Ct. Cl. 546 (Chinese Indemnity); The case of the *Alabama*, in which Great Britain was held liable for failing to prevent individuals from violating British neutrality, Moore's Dig. VI, 999; *Evertsz (Netherlands) v. Venezuela*, Feb. 28, 1903, *Ralston*, 904 (government negligently left military prisoners without means of sustenance, and was therefore held liable for cattle they appropriated). 49 *Law Times*, 84. *Mr. Bayard to Mr. Scruggs*, May 19, 1885, *For. Rel.* 1885, 212; *Baldwin case in Mexico*, 1887 (murder by well-known outlaws); *Caccavelli claim (France) v. Dominican Rep.*, *For. Rel.* 1895, I, 398, 400. *Mr. Frelinghuysen, Sec'y of State, to Mr. Matthews*, Jan. 16, 1883, Moore's Dig. VI, 792; *Calvo*, § 1274.

By reason of its territorial jurisdiction, the state is in equal measure responsible for the acts of resident aliens as of its nationals. 2 *Wharton*, § 205.

case is often difficult to determine. Hall protests vigorously against the doctrine advanced by the United States and supported apparently by the tribunal of arbitration in the *Alabama* case, that the "diligence" required must be "commensurate with the emergency or with the magnitude of the results of negligence."¹

A more frequent basis of governmental liability is the failure, after reasonable opportunity, to bring the offenders to justice.² Incidental to this ground of liability is the inadequate punishment of guilty individuals,³ negligently permitting them to escape,⁴ or an inexcusable delay in investigating the facts.⁵ Closely related to these reasons for responsibility is a pardon or amnesty to offenders, by which the plaintiff is deprived of the right to try the question of liability, or the punishment of the guilty is avoided.⁶

We have already adverted to the fact that on several occasions, confined almost exclusively to the weaker countries, the "due diligence" rule has been disregarded, governmental liability being predicated on the mere *inability* to prevent the act or bring the offenders to justice.⁷

¹ Hall, 217.

² *De Brissot (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 2868 (opinion of Mr. Little); *ibid.* 2969 (opinion of Mr. Findlay)—offender permitted to go at large. *Poggioli (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 869; *Renton claim v. Honduras*, For. Rel. 1904, 363 (refusal to diligently prosecute and punish); *Piedras Negras Claims (Mexico) v. U. S.*, July 4, 1868, Moore's Arb. 3035 (failure to punish); *Same in Ruden (U. S.) v. Peru*, Dec. 4, 1868, *ibid.* 1653, 1655; *Labaree claim v. Persia*, For. Rel. 1904, 657 *et seq.*; *Maninot (France) v. Venezuela*, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 44, 70.

Willful neglect to punish may be considered an implied sanction. E. W. Huffcut in 2 *Annals, Amer. Acad. of Pol. and Soc. Science* (1891), 69; Fiore, §§ 669-670.

Sec'y Fish in 1875 held that there was no duty to punish in the absence of information as to the offenders (murderers); Moore's Dig. VI, 789.

³ *Lenz claim v. Turkey*, Mr. Hay to Mr. Straus, March 25, 1899, For. Rel., 1899, 766, and Moore's Dig. VI, 792-794; *Renton claim v. Honduras*, For. Rel. 1895, II, 890, 934; 1897, 347; 1904, 363, and Moore's Dig. VI, 794-799 (condemnation for minor offenses of persons guilty of murder).

⁴ *Lenz case* and *Renton case* (For. Rel., 1904, pp. 352, 362) cited in footnote, *supra*.

⁵ *Ruden (U. S.) v. Peru*, Dec. 4, 1868, Moore's Arb. 1653, 1655; *Prince of Wales claim (Gt. Brit.) v. Brazil*, 1862, 54 St. Pap. 614 *et seq.*

⁶ *Montijo (U. S.) v. Colombia*, Aug. 17, 1874, Moore's Arb. 1421, 1444; *Cotesworth and Powell (Gt. Brit.) v. Colombia*, Dec. 14, 1872, *ibid.* 2050, 2085.

As to the effect of amnesty on liability for the acts of rebels, see *infra*, p. 238.

⁷ *Supra*, p. 215.

In several cases it has been held that before the government can be rendered liable the individual must have given notice in time opportunity to have prevented the injury,¹ or have made a demand for punishment of the offenders,² and prove a lack of reasonable diligence in preventing the injurious act or a refusal to bring the offenders to justice.³ These cases need not, however, be considered authoritative, inasmuch as, in practice, the government has often been held to show, particularly in cases of brigandage and acts of groups of individuals, that it has used due diligence to prevent the act or to punish the offenders, notice on the part of the victim serving simply to lay a stronger foundation for governmental liability.

The denial to the party aggrieved of a right of action against the offender or a denial of aid in the prosecution of the claimant's rights may be construed as an adoption of the act by the government, entailing the responsibility of the state. It is in effect a denial of justice.⁴ A pardon or amnesty to offenders depriving claimants of the right to try the question of liability or to secure the punishment of the guilty, has a similar effect.⁵

§ 88. Brigandage.

The liability of the state for acts of brigandage brings up practically the same questions as those which have just been discussed. In the absence of proof that the government has neglected to take proper steps to suppress brigandage or punish the guilty, the state is not liable.⁶

¹ *Post (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2998; *Garza (U. S.) v. Mexico*, *ibid.* 3038.

² *Dickens (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3037; *Poggioli (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 869.

³ *Wipperman (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3039, 3041; *Dickens (U. S.) v. Mexico*, July 4, 1868, *ibid.* 3037.

⁴ Kane's notes on the treaty with France of July 4, 1831, pp. 31, 32; *Poggioli (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 847, 869; *Johnson (U. S.) v. Peru*, Dec. 4, 1868, Moore's Arb. 1656-1657.

⁵ *Supra*, p. 218, note 6.

⁶ Moore's Dig. VI, 800-809; *Case of Miss Ellen Stone in Turkey*, For. Rel., 1902, 997-1023; 27 Law Mag. and Rev. (1901), 337; *Richter's case in Turkey*, 39 Clunet (1912), 998; *Dambitsch in Deutsche Juristen-Zeitung*, 1911, col. 1208-1210; *Capture and murder of British subjects in Greece*, 65 St. Pap. 667-723; *Synge and Suter cases in Turkey*, 1881, 72 St. Pap. 1167.

Question has often arisen as to the liability of the defendant states for ransoms demanded by and paid to brigands by claimants or their governments. The claimant state (*i. e.*, the national state of the victim) has only in rare cases, as a matter of humanity, advanced the price of a ransom for payment to brigands.¹ Reimbursement has on several occasions been demanded of the defendant state or else that state has been asked to make a direct payment to the brigands.² Only in rare instances have such demands been successful, and then only because actual or implied complicity or negligence of the state was asserted or admitted.³

MOB VIOLENCE

§ 89. Obligations of the Government.

The principles governing the responsibility of the state for injuries sustained by aliens as a result of mob violence or riot are closely related to those governing its responsibility for injuries committed by individuals. In all parts of the world it occasionally happens that mobs in sudden outbreaks of passion sweep away all restraint and vent their fury upon aliens. These contingencies arise in well-ordered as well as in unstable governments, and the ordinary precautions against disorder often prove insufficient to avoid them. In such cases, if the authorities have used due diligence to prevent or repress the riot and punish those who may be concerned in it, the government is relieved from legal liability, unless it is under special obligations to render pro-

¹ In 1881, after the Synge and Suter cases, when ransoms were paid by Great Britain for the release of these subjects by brigands, that government decided not to advance money in future for such purposes. 72 St. Pap. 1167 *et seq.* In 1907, however, the British government demanded a large sum from Turkey on account of the ransom paid for the release of Mr. Robert Abbott. The fact that he was kidnapped from his house in the heart of a large city, puts this case on different grounds than the usual case of brigandage. Several bills have been introduced in Congress to reimburse those persons who subscribed to the ransom which secured the release of Miss Ellen Stone. See *infra*, p. 413.

² Great Britain *v.* Turkey, 1881, 72 St. Pap. 1167; Great Britain *v.* Greece, 65 St. Pap. 667-723.

³ Turkey and Greece in cases cited in note 2, *supra*. On principle, the defendant government is not liable for ransoms paid to criminals on behalf of victims of their acts. See cases cited in 27 Law Mag. and Rev. (1901), 337.

tection, either by virtue of a treaty or of the official character of the person assailed.¹ By the fact that weak governments like China, Morocco and others in the Far and Near East are held to a high degree of responsibility for injuries due to mob violence, it may be concluded that a fundamental condition of non-liability of the government is a stable political organization normally adequate to prevent such outbreaks.

The difficulty in determining governmental liability lies in establishing what is "due diligence" in a given case. The question of burden of proof is of minor importance, inasmuch as the happening of the event usually throws upon the defendant government the duty to show that it has used its best efforts to prevent the disaster and punish the guilty. In well-ordered states evidence of due diligence will be more readily received as a bar to a claim for indemnity than in normally disturbed states like China and other countries in the Near and Far East. Nevertheless, aside from any question of delinquency upon the part of the authorities, it may be said that in most cases of injuries inflicted upon aliens during riots, indemnities have been paid as a matter of equity, either because of the fact that the fury of the mob was directed against aliens as such, or against the subjects of a certain foreign power, as in the Aigues-Mortes riots in 1893, or because such outbreaks having occurred on several occasions within the same state, a moral obligation to make amends is assumed by the state, either for its inability to prevent such disorders or for the inadequacy of redress

¹ The responsibility of governments for mob violence, by J. B. Moore, *Columbia Law Times*, May, 1892, 211-215. See also articles by James Bryce, *Legal and constitutional aspects of the lynching at New Orleans*, 4 *New Review*, May, 1891, 385-397; by E. W. Huffcut, *International liability for mob injuries*, 2 *Annals of the Amer. Acad. of Pol. & Soc. Science* (1891), 69-84; by H. Arias, *The non-liability of states for damages suffered by foreigners in the course of a riot, an insurrection or civil war*, 7 *A. J. I. L.* (1913), 724-766; and see also a good article on the same general subject by Julius Goebel, Jr., in 8 *A. J. I. L.* (1914), 802-852 and a doctoral dissertation by Georg Muszack, *Ueber die Haftung einer Regierung für Schäden welche Ausländer gelegentlich inneren Unruhen in ihren Landen erlitten haben*, Strassburg, 1905, in both of which there is an interesting discussion of theory. See also Moore's *Dig.* VI, 809-883, and the general works of Calvo, III, § 1280 *et seq.*; Bluntschli, § 380 *bis*; Hall, 6th ed., 215, 219; Westlake, 2nd ed., I, 329; Oppenheim, 2nd ed., I, 222; G. de Leval, *Protection diplomatique des nationaux*, 173.

through judicial channels¹. The legal aspects of state responsibility in these cases will be considered presently.

§ 90. Special Protection Due in Certain Cases.

The obligation to indemnify arising out of a treaty guaranty of special protection, regardless of any delinquency of the authorities, is illustrated in the case of the Panama riot claims of 1856 against New Granada, which the latter country satisfied on account of having undertaken, by article 35 of the Treaty of 1846 with the United States, "to preserve peace and good order along the transit route."² Wherever a government obligates itself to preserve order, as weak countries frequently do, claims for injuries arising out of mob violence are usually rigorously prosecuted. China, indeed, regardless of treaties, has in innumerable cases been held to a degree of responsibility amounting actually to a guaranty of the security of persons and property of aliens.³ Turkey, Morocco and other countries where governmental control is weak and civil disorders are not an abnormal condition are held only to a slightly narrower degree of responsibility.

The United States has on several occasions resisted the attempts of foreign governments to fix liability on the federal government be-

¹ Aigues-Mortes riots, 1 R. G. D. I. P. (1894), 171 *et seq.*; Calvo, VI, § 256; Saida case in 1881, 1 R. G. D. I. P. (1894), 171, 175. Sacking of mission houses at Nietheroy, near Rio Janeiro, For. Rel., 1901, 28-30; Fortune Bay case, 1878, fisherman driven out in violation of treaty, Moore's Dig. VI, 819; 72 St. Pap. 1265. Killing of Chinese at Torreon, Mexico, 1910, for which Mexico paid a large indemnity, Convention of Dec. 16, 1911, 8 A. J. I. L. (1914), Suppl. 147. See Goebel in 8 A. J. I. L. 813, 819-831, who finds, in cases of violence against certain nationalities, a legal liability, regardless of fault by the state. The payments made in numerous cases, and various statutes imposing a liability upon municipalities, regardless of fault, lend support to this view.

² Moore's Arb. 1361-1396, at p. 1379. New Grenada assumed liability in the convention of Sept. 10, 1857, art. 1. See also, as to British claims, 65 St. Pap. 1219.

³ In fact, so frequent have been the cases of murder of missionaries by rioters in China that a practice of the U. S. has grown up fixing the sum of \$5,000 as indemnity for a human life. The British and French governments exact as heavy indemnities as possible, and exemplary damages as well, in flagrant cases. These cases in China are illustrated by the following incidents: the Boxer movement, Moore's Dig. V, 476-533; the Lienchou indemnity, For. Rel., 1906, 308-341; 1907, pt. I, 211-218; the Shanghai riots, For. Rel., 1908, 146; other cases in For. Rel. See also 35 Clunet (1908), 646; Bonfils, § 440; French claims, 51 St. Pap. 651, 668.

cause their subjects were by treaty promised "protection," on the ground that aliens were given the same protection and means of judicial redress as nationals.

The special protection due to the representatives of foreign powers explains the prompt payments of indemnities for attacks by mobs on foreign consuls or consular agents. The consul is considered as injured not alone as an individual but in his character as the representative of a foreign government.¹

§ 91. Factors Imposing Liability upon the Government.

It has already been observed that on principle the government is not liable for the unlawful acts of a mob which by due diligence it was unable to quell or whose acts it was unable to prevent. On this ground the United States has, on occasion, declined to press claims against foreign governments and has successfully resisted the attempts of foreign governments to render the United States liable.² It is a necessary condition, however, that judicial recourse be open to the victims of the mob. In such cases, the foreign government can on principle demand no greater reparation than the municipal law provides for nationals.³

¹ Rev. Stat., § 4062 gives special protection to the diplomatic representatives of foreign governments. See also U. S. Consular Regulations, § 72. The following cases of attacks upon foreign ministers, consuls or consular agents by mobs were met by prompt indemnities: Spanish consul in New Orleans, Aug. 21, 1851, Moore's Dig. VI, 811, 813; U. S. consular agent in Mollendo, Peru, For. Rel. 1893, 509-524; French consulate in Naples, 1893, Calvo, I, § 256; German legation in Madrid, 1885, Calvo, § 1272; Spanish minister in Santiago, Chile, 1864, Wiesse, C., *Le droit int. appliqué aux guerres civiles*, Lausanne, 1898, p. 47. See also cases cited in Moore's Dig. V, § 704.

² Attacks on Chinese in Denver, 1880, Moore's Dig. VI, 820; Attacks on British subjects in Texas, 1880, and on Japanese subjects in Utah, 1884, Moore's Dig. VI, 819; Attack on Protestant church at Acapulco, Mexico, 1875, Moore's Dig. VI, 815; Shann's case *v.* Spain (attack in Cuba, 1834), Moore's Dig. VI, 259; *Derbec (France) v. U. S.*, Jan. 15, 1880, Moore's Arb. 3029; *Laguerene (U. S.) v. Mexico*, March 3, 1849, *ibid.* 3027 (*dictum*); *Underhill (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, I, 45, 50; *Serra (Italy) v. Peru*, Nov. 25, 1899, Descamps and Renault, *Rec. des traités*, etc., 1901, p. 720; Bluntschli, § 380 *bis*.

³ See speech of M. Pichon, French minister of foreign affairs, in connection with the Barcelona riots of 1909, 37 *Clunet* (1910), 1140. See also Russian defense against Swiss claims, 1905, *Rapport du Conseil Federal* (Switzerland), 1905, p. 300.

The government is liable, however, where it fails to show due diligence in preventing or suppressing the riot, or where the circumstances indicate an insufficiency of protective measures or a complicity of government officers or agents in the disorder. The negligent failure to prevent the riot has on several occasions been made the principal ground of government liability,¹ and in a few cases liability has been predicated upon insufficiency of police protection.²

Liability is still more definitely fastened upon the government where persons in its employ connive at or show indifference to the riot and the resulting damage or injuries.³

¹ New Orleans attack upon Italians in 1891, Moore VI, 837 *et seq.*; Westlake, I, 329; James Bryce in 4 New Review, May 1891, 385; 18 Clunet (1891), 1147-1161; Colorado riot against Italians in 1895 (authorities made no resistance), For. Rel., 1895, II, 938 *et seq.*; Rock Springs riot against Chinese, 1885, Moore's Dig. VI, 822 *et seq.* (local authorities stood by with evidence of actual approval); Casablanca riots directed against foreign workmen, 1907, For. Rel., 1907, II, 889-899 (some conflicting evidence as to whether failure to prevent riot was due to negligence or not); *Dupleix* affair of France *v.* Japan, massacres in 1868; Radcliffe claim (Gt. Brit.) *v.* U. S. for destruction of claimant's fish hatchery in Colorado, 1901, where state failed to afford protection, notwithstanding request therefor. 34 Stat. L. 1400; Sen. Doc. 271, 58th Cong., 2nd sess., H. Doc. 441, 59th Cong., 1st sess.; Riots against Greeks in South Omaha, 1909, where police, with notice of hostility against the Greeks, permitted circulation of petition calling mass meeting to devise measures to "effectively rid" the city of the Greeks, and permitted the mass meeting and the inflammatory speeches there uttered, and chief of police allowed half his force to remain off duty. The Department of State would be justified in considering these facts as amounting to police negligence.

² Cases in Marsovan and elsewhere in Turkey, Moore's Dig. VI, 865; For. Rel., 1897, 588-92; Bain case (Gt. Brit.), *v.* U. S., 1895 (shot unintentionally by rioters; police hid for safety behind cotton bales), For. Rel., 1895, I, 686-696, 298-301, Moore's Dig. VI, 849; Wexel and De Gress (U. S.) *v.* Peru, 1876, Moore's Dig. VI, 817; Don Pacifico (Gt. Brit.) *v.* Greece, 1847, Moore's Dig. VI, 852. Several cases in which the victims were taken from jail by a mob (New Orleans case in 1891, *supra*; Hahnville, La, For. Rel., 1896, 396-426; 1897, 353-354; Tallulah, La, For. Rel., 1899, 440-466; *ibid.* 1900, 715-731 and President's messages, 1899 and 1900; Moreno case in California, 1895, Moore's Dig. VI, 851; Albano case in Tampa, Fla., 1910, H. Doc. 105, 63rd Cong., 1st sess., are *prima facie* chargeable to insufficiency of police protection, although the U. S. denied government liability and paid indemnities out of humane considerations or as an act of grace.

³ Mr. Fish, Sec'y of State, to Mr. Partridge, March 5, 1875 (a case in Brazil), 2 Wharton, 602; Buildings burned in Marsovan, Harpoot and Marash in presence of Turkish soldiery, Moore's Dig. VI, 865 citing For. Rel. 1893 and 1895, and President's message, 1896; Chinese riots in 1856, where American citizens were compelled

The liability of the government is even less doubtful where the police or other officials are implicated in the violence. So where the mob was aided by soldiers or gendarmes,¹ or where the police took part in the assault,² governmental liability was asserted and pressed to a successful issue.

The failure to punish the guilty individuals furnishes a ground of liability. The difficulty of ascertaining the identity of the guilty individuals and of securing their indictment and punishment is, owing to the circumstances of such mob disorders, easily apparent. The identity of individuals is usually lost in the mob and public sympathy with rioters usually frustrates every attempt to indict, try, and punish. The United States, notwithstanding denial of legal liability, has in a number of cases paid indemnities to foreign governments where there was a failure to punish any guilty individuals.³

The peculiar constitutional position of the United States by which the rights of aliens are assured by the federal government under treaty and yet the punishment of offenses against these rights is within the control of the states, has caused many protracted arguments in mob violence cases. Owing to local feeling, it is generally impossible to secure the indictment and punishment of rioters, and state officials do not always use their best efforts to bring about their prosecution.

to flee from the fury of the mob, supported by the authorities, Moore's Arb. 4627; Wright claim against Guatemala, For. Rel., 1909, 354-355.

¹ Don Pacifico case (Great Britain) *v.* Greece, Moore's Dig. VI, 852, citing 39 Br. and For. St. Pap.

² U. S. S. *Baltimore v.* Chile, 1890, Moore's Dig. VI, 854-864; Riots at Port-au-Prince, Haiti, 1885, Moore's Arb. 1859; Riots in Panama against officers of U. S. S. *Columbia*, 1906, and against sailors of U. S. S. *Buffalo*, 1908, For. Rel., 1909, 474, 491; Panama Riot claims, Moore's Arb. 1361 *et seq.*; Donoughho (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3014; Jeannotat (U. S.) *v.* Mexico, *ibid.* 3674.

³ While the victims have generally been referred to their judicial remedies and a denial of government liability was predicated largely upon their failure to sue civilly, the futility of a resort to the civil courts is as a rule even greater than the attempt to prosecute criminally. The cases indicate that the argument has not been seriously pursued in bar of the claimant's title to relief.

In the Erwin case in Mississippi (1901), the identity of the guilty persons was not ascertained, For. Rel., 1901, 283 *et seq.* In the New Orleans (1891), Tallulah, Moreno and Suaste cases no indictments were found. In the South Omaha (1909) case, no one was brought to trial, although a few were indicted. In the Don Pacifico case there was a failure to pursue judicial inquiries or institute prosecution.

The federal government must content itself with a courteous request upon the governor of the state to secure punishment of the guilty, or to make appropriate amends. The offense being considered as one against state law, there is no legal power to bring the offenders to justice in the federal courts. The United States, on its own part, can show a consistent effort to bring about punishment, and on this ground has sometimes denied its liability for the injuries. Indemnities have been paid in such cases without the admission of legal liability. The inability through constitutional defects to enforce treaty rights of aliens is not, however, a sufficient answer to an assertion of international liability for violation of aliens' treaty rights, and where state officials are delinquent, either in preventing the riot or punishing the rioters, and decline to pay indemnities to the victims, the federal government must, by reason of the very defectiveness of its internal machinery, undertake this international liability. The recommendations of Presidents Harrison, McKinley, Roosevelt and Taft to bring within the jurisdiction of the federal courts offenses against the treaty rights of aliens, have not resulted in remedial legislation.¹ The United States, moreover, has resisted the attempts of foreign governments to plead constitutional defenses as a bar to international obligations.²

§ 92. Statutory Compensation by Municipalities.

By the municipal law of some jurisdictions, cities and counties are

¹ Senate Rep. 392, 54th Cong., 1st sess., to accompany S. 1580. Several bills have been introduced to bring about this result. For President Harrison's recommendation see message of 1891, For. Rel., 1891, vi; for President McKinley's recommendations, see messages of 1899 and 1900, For. Rel., 1899, xxiii, 1900, xxii; for President Roosevelt's, see For. Rel., 1906, xliii. See also 3 Op. Atty. Gen. 253. The federal government, as is the case in Switzerland (Constitution, art. 82, 112, 113), should have the exclusive right to legislate concerning aliens, just as it has the power to conclude treaties. It should at least have the power to prevent states from discriminating between aliens of different nationalities. Burr, Treaty-making power, 1912, p. 377 *et seq.* This constitutional conflict in the United States has on several occasions led to diplomatic difficulties with foreign governments. See Resolutions of the Institute of Int. Law, Sept. 10, 1900, Paragraph 4; 18 *Annuaire*, 255; Speech of Senator Edmunds, June 3, 1886, Cong. Record, v. 17, part 5, p. 5186; and a good discussion by Robert Lansing in 1908 Proceedings of the Amer. Soc. of Int. Law, v. 2, pp. 44-60. See also *supra*, p. 202, note 1.

² Smyth case in Brazil, 1875, Moore's Dig. VI, 815.

compelled to indemnify the victims of mob violence. A law of 1795 to this effect in France, and another in Belgium, is still in force and has been invoked on many occasions.¹ A similar system prevails in some of the states of Germany and in Austria. Several states of this country have enacted statutes making cities and counties liable for injuries inflicted upon private property and individuals by mobs.² The theory underlying these statutes is that in a well-ordered community the citizens should prevent such injuries, and that the innocent victims of such a disaster should not alone bear a loss, which should be distributed among the members of the community at large.³ The theory is closely related to that justifying workmen's compensation, indemnity for errors of criminal justice, and social insurance generally.

The Institute of International Law considered that independently of the right of aliens to indemnity by municipal law, they have the right to compensation when injured in person or property during mob

¹ The French decree of 1795 (10 vendémiaire an IV), which also applied to Belgium, has been somewhat amended by the law of April 5, 1884, arts. 106-109 and by the recent amending law of April 16, 1914 which governs the distribution of liability between state and commune. See 31 Rev. du. Dr. Pub. (1914), 445-448. The original French law is set out briefly in Calvo, III, § 1291. The law of 1884 imputes liability to the commune whether citizens or aliens caused the damage, whereas the law of 1795 excluded liability if caused by aliens. By both laws (§ 108 of the law of 1884) the commune is released from liability if it can prove that all measures within its power were taken to prevent the riot. The statute applies alike to aliens and to nationals, 24 Clunet (1897), 786. See De Groote, H., *De la responsabilité des communes en cas d'émeute et de grève*, Paris, 1906; Duvivier, Paul, *Etude sur le décret du 10. vendémiaire an IV*, Bruxelles, 1904. See also *supra*, p. 141 and works by Poissonier and Beaudouin, cited in note 2; G. de Leval in 24th Rep. of the Int. Law Asso. (1907), 207. See also 23 Journal du Dr. Administratif (1875), 526.

Statutes making communities liable for depredations committed by lawless persons have long existed in England. *Ratcliffe v. Eden*, 2 Cowp. 485; see also 4 Law Mag. and Rev. (1875), 552-562.

² Statutes to this effect, varying in detail, have been enacted in the following states: California, Illinois, Kansas, Maine, New Hampshire, New York, Pennsylvania. Dillon, *Municipal corporations*, 5th ed., IV, §§ 1637-1638.

The constitutionality of these statutes has been upheld by the Supreme Court in *Louisiana v. New Orleans*, 109 U. S. 285; see also *Pennsylvania Co. v. Chicago*, 81 Fed. 317, and the extensive note in 6 Amer. & Eng. Ann. Cases, 268. It is, under most of the statutes, immaterial whether defendant could or ought to have prevented the destruction of plaintiff's property.

³ See *Darlington v. New York*, 31 N. Y. 164.

violence where the fury of the mob is directed against aliens as such or as subjects of a certain state.¹ This was considered by Prof. von Bar as an acknowledgment of the principle that the state does not guarantee aliens any greater security than nationals.² When the injured person has provoked the violence against himself, the obligation of the state ceases.³

The fact that indemnities are so frequently paid in mob violence cases has led some writers to conclude that the distinction between equitable compensation and indemnity for legal fault is specious only, and that the mere happening of the event entails liability. It is not advisable, however, to eradicate the distinction or to impose upon the government a presumption of absolute guaranty for the security of aliens, notwithstanding the fact that in most of the cases, equitable considerations, if not law, dictate the justice of indemnity.

CIVIL WAR INJURIES

§ 93. General Principles and Theory.

The principles governing the responsibility of the state for injuries sustained by aliens during civil war bear close relation to those governing its responsibility in the case of mob violence, but embrace so many distinctively characteristic features that the subject warrants separate treatment. It is not without many difficulties. These arise principally from the fact that the practice of states has varied greatly in the application of such rules as may be considered to govern the subject.

The question of terminology need not detain us long. Publicists have distinguished between sedition, insurrection and civil war; but for present purposes these may be regarded as different degrees of a political uprising of part of a civilized society against the lawfully constituted authorities.⁴

¹ 18 *Annuaire*, 254-256. This excludes the theory of fault of the government, and there is much to be said in its support. Goebel in 8 *A. J. I. L.* (1914), 812.

² 18 *Annuaire*, 237.

³ 18 *Annuaire*, 255, paragraph 3. The complete resolutions of the Institute of Sept. 10, 1900 on this subject are reprinted in Oppenheim, I, 224-225.

⁴ The distinctions are discussed in some detail in Lawrence's *Wheaton*, pp. 522-523, note 171.

Different theories have prevailed as to the liability of the state for injuries sustained by aliens in civil war. One doctrine, supported by Brusa, Bar and other distinguished publicists, holds that the state is responsible on principle for all such damage sustained by aliens.¹ This doctrine of responsibility, briefly, is based on one of several theories: (1) the fault of the state in permitting a revolution to arise;² (2) the theory of expropriation,³ according to which the state at the sacrifice of individual property derives a public benefit from the suppression of a revolution; (3) the theory of risk,⁴ according to which the state assumes the risk of maintaining order, or, in other words, the state becomes a guarantor of safety; or (4) the theory of social insurance,⁵ by which the state fulfills its highest mission in preserving its integrity and should compensate those individuals who suffer accidental sacrifices in the attainment of this end.⁶

These theories, however interesting, have all been abandoned and the doctrine which has now received general support is that on principle the state is not responsible for the injuries sustained by aliens at the hands of insurgents in civil war unless there is proven fault or a want of due diligence on the part of the authorities in preventing the injury or in suppressing the revolution.⁷ inc

¹ Brusa in 17 *Annuaire*, 132; Von Bar in 31 *R. D. I.* (1899), 464-481. The various theories were fully discussed by the Institute of International Law. 17 *Annuaire*, 96-137, 18 *Annuaire*, 47-49, 233-256, 20 *Annuaire*, 312-319. See also Daniel An-tokoletz in 28 *Rev. de Derecho Hist. y Let.* (1907), 307-332; and Rougier, A., *Les guerres civiles et le droit des gens*, Paris, 1903, 466 *et seq.*

² Wiese, *Le droit international appliqué aux guerres civiles*, Lausanne, 1898, 52.

³ Brusa in 17 *Annuaire*, 135.

⁴ Fauchille, 18 *Annuaire*, 233 *et seq.* included.

⁵ 17 *Annuaire*, 96. This theory, although criticized by Brusa, bears an intimate relation to his own theory of expropriation.

⁶ Brusa also criticizes the doctrine of non-liability based on the theory of *force majeure* on the ground that the element of *will* enters into civil war. He also criticizes the theory of fault, which he considers too difficult to prove in the case of the state.

⁷ This doctrine is supported by the overwhelming weight of authority, on the part of writers, of arbitral commissions, and of foreign offices. See Hall, 219; Oppenheim, 223; Bonfils, 6th ed., 195; Fiore, *Nouveau dr. int.*, § 675; Pradier-Fodéré, §§ 204, 205, 1224; Despagnet, 4th ed., § 333, p. 471; Bluntschli, § 380 *bis*; Calvo, §§ 1280 *et seq.* Calvo's frequently quoted illustration of the British demands for injuries sustained in the disturbances at Tuscany and Naples, in 1849, is based on a

This doctrine is predicated on the assumption that the government is reasonably well ordered,¹ and that revolution and disorder are abnormal conditions. "Where a state has fallen into anarchy, or the misconception of the facts. See Moore's Dig. VI, 978. See also Calvo in 1 R. D. I. (1869), 417; Anzilotti in 13 R. G. D. I. P. (1906), 305, and the following special works: Wiesse, *op. cit.*, 42 *et seq.*; Rougier, *op. cit.*, 448 *et seq.*; Sadoul, Paul, *De la guerre civile en droit des gens*, Nancy, 1905, 177 *et seq.*; Breton, *Responsabilité des états en matière de guerre civile touchant les dommages causés à des ressortissants étrangers*, Nancy, 1906. *El extranjería en la guerra civil*, by Luis A. Podesta Costa, 42 Rev. de derecho hist. y let. (1912), 356-387, 500-524; 43 *ibid.* 238-242, published also in book form, Buenos Aires, 1913; Non-liability of states for damages suffered by foreigners in the course of a riot, an insurrection, or a civil war by H. Arias in 7 A. J. I. L. (1913), 724-766, and an article on the same subject by Julius Goebel, Jr., in 8 A. J. I. L. (1914), 802, 813-852; Pennetti, V., *Responsabilità internazionale in caso di rivolte o di guerra civile*, Napoli, 1899, 24 p.

The very few writers who support the contrary doctrine of state responsibility qualify their rule considerably. Bar, in 31 R. D. I. (1899), 464; Brusa in 17 *Annuaire*, 96; Rivier, II, 43.

The general rule has been almost uniformly applied by international commissions, unless by the protocol their jurisdiction was specially limited. See the following decisions in support of the general rule: Prats (Mex.) v. U. S., July 4, 1868, Moore's Arb. 2886-2900 (an exhaustive discussion of principles), and other cases cited on page 2900; Pope (U. S.) v. Mexico, Mar. 3, 1849, *ibid.* 2972; Schultz (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2973; Cummings (*ibid.* 2977, opinion by Thornton; Wadsworth, American commissioner, considered Mexico liable for the failure to use reasonable efforts to suppress the disorders); Wyman (*ibid.* 2978); Silva (*ibid.* 2979); Divine (*ibid.* 2980); McGrady (U. S.) v. Spain, Feb. 12, 1871, *ibid.* 2981; Zaldivar (*ibid.* 2982); Hanna (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 2982-2987; Laurie (*ibid.* 2987); Stewart (*ibid.* 2989); Puerto Cabello Railway (Gt. Brit.) v. Venezuela, Feb. 13, 1903, Ralston, 458; Aroa Mines (Gt. Brit.) v. Venezuela, *ibid.* 381-2; Crossman (Gt. Brit.) v. Venezuela, *ibid.* 298; Bolivar Ry. (Gt. Brit.) v. Venezuela, *ibid.* 388; Cobham (Gt. Brit.) v. Venezuela, *ibid.* 409; Van Dissel (Germany) v. Venezuela, Feb. 13, 1903, *ibid.* 565; Sambiaggio (Italy) v. Venezuela, *ibid.* 680; Guastini (Italy) v. Venezuela, *ibid.* 730; Revesno *et al.* (Italy) v. Venezuela, *ibid.* 753; Guerrieri (Italy) v. Venezuela, *ibid.* 753; De Caro (Italy) v. Venezuela, *ibid.* 810; Henriquez (Netherlands) v. Venezuela, Feb. 28, 1903, *ibid.* 899; Salas (Netherlands) v. Venezuela, *ibid.* 903. See cases collected in Ralston's International arbitral law, p. 233 *et seq.* Ralston, umpire in the Sambiaggio case, and Plumley, umpire in the Aroa Mines and Henriquez cases, *supra*, entered into extensive and illuminating discussions of the subject. See also Strong, arbitrator in Gelbrunk (U. S.) v. Salvador, For. Rel. 1902, 876. The principle was upheld by the Anglo-Chilean Tribunal of 1894 (For. Rel. 1896, 35), and by the Spanish Treaty Claims Commission, Final Report, Sen. Doc. 550, 61st Cong., 2nd sess., pp. 4, 7. This last commission examined the question exhaustively, and many learned briefs were submitted. See particularly.

¹ Hall, p. 219.

administration of law has been nerveless or inefficient, or the government has failed to grant to a foreigner the protection afforded citizens, or measures within the power of the government have not been taken

Vols. 2 and 3 of the collected briefs. In a few cases awards were made for injuries inflicted by insurgents, based upon the refusal of the Spanish officials to allow the owners to remove their personal property to a place of safety (see also Rule 3 of the Nicaraguan Mixed Cl. Com. of 1911) or upon wrongful interference by those officials during the process of such removal. Final Report, 8. See also the "mobilizados" awards (p. 9) and the Tuinucu award (No. 240) attributed to negligence of Spain in failing (not through inability) to afford protection (p. 8). As a rule, the general powerlessness of Spain to protect Cuban plantations, relieved her of liability for injuries committed by the insurgents.

Exceptions to the general principle were made in the Venezuelan Steam Transportation Company case (U. S.) *v.* Venezuela, Jan. 19, 1892, Moore's Arb. 1693, 1723, although the exception is greatly weakened by the absence of grounds for the decision. (Andrade wrote an excellent dissenting opinion supporting the general rule of non-liability, pp. 1724-1732.) See criticisms of the decision by Ralston and Plumley expressed in the Sambiaggio and Aroa Mines cases (*supra*) and printed in Ralston's International arbitral law and procedure, Boston, 1910, p. 237. The *Montijo* award (U. S.) *v.* Colombia, August 17, 1874, Moore's Arb. 1421, 1426, another exception to the rule, was based on the U. S.-New Grenada special treaty of guaranty of protection and on the fact that an amnesty had been given to the rebels. It was not decided on principle. In the case of Easton (U. S.) *v.* Peru, Jan. 12, 1863, Moore's Arb. 1629, another exception to the rule, the Peruvian council of ministers had admitted liability. The question of Peru's liability for the acts of revolutionists seems not to have been discussed.

The reason that umpire Duffield in the German-Venezuelan commission of 1903 (case of Mohle, Ralston, 574; Fulda, *ibid.* 561; Kummerow, *ibid.* 559; Redler, *ibid.* 560 (*dictum*); Great Venezuelan Railroad, *ibid.* 639; Valentiner, *ibid.* 565) held Venezuela liable was based on what he construed to be an admission of liability in the protocol of arbitration. Throughout the decisions he expressed the view that it was contrary to principle, and he confined it strictly to the specific insurrection covered by the admission, and not to any other (Van Dissel, Ralston, I, 565, 573), nor to the acts of guerillas (Great Venezuelan Railroad, *ibid.* 639). The umpire of the Spanish-Venezuelan commission, Gutierrez-Otero (Mena, Spain *v.* Venezuela, April 2, 1903, Ralston, 931; Padron, *ibid.* 923, 926) held that under that protocol the interposition of the general rule by Venezuela as a defense to the claim was a "technical objection" within the inhibition of the protocol. See Ralston's criticism of this view in Guastini, *ibid.* 748. Filtz, umpire of the French-Venezuelan commission, gave no reasons for his decisions, although presumably he always considered that there was an admission of liability in the protocol.

The State Dept. and the British Foreign Office have almost uniformly maintained the principle that a government is not ordinarily liable for the acts of insurgents beyond its control, if by due diligence the government could not have prevented the acts complained of. Mr. Uhl, Acting Sec'y of State, to Mr. Springer, July 1, 1895,

to protect those under its jurisdiction from the acts of revolutionists,"¹ the general rule is suspended and foreign states may not only intervene by force for the protection of their subjects, but may demand indemnities, whether the injuries were sustained at the hands of the government forces or the insurgents.² The mere fact that the state is subject to frequent revolution does not, however, affect the general rule of non-liability.³ The Spanish Treaty Claims Commission, after hearing lengthy arguments, adopted the following rules:

"In order to recover for damages done by insurgents" claimants must "allege and prove that at the time and place when and where the injury was done the [government] authorities could, by due diligence, and should have prevented such injury."

"In order to recover for damages done by the [government] forces" it is necessary to prove "that the acts done which resulted in the injury were done wantonly and unnecessarily."⁴

For. Rel. 1895, 1216; Mr. Hay to Mr. Dudley, Dec. 7, 1899, Sen. Doc. 419, 56th Cong., 1st sess. (Gottfried claim *v.* Peru), 108. See also extracts in Moore's Dig. VI, 954-970 and Wharton, II, §§ 223-226. Instructions of British Foreign Office to Minister in Colon, quoted in Moore's Arb. 1728, Sen. Doc. 254, 57th Cong., 1st sess. See Peruvian S. S. *Huascar* case, 1877, 68 St. Pap. 745.

A few exceptions to the general rule are contained in extracts printed in Moore's Dig. VI, 972 *et seq.* They are based either on special circumstances or on the theory (see Mr. Fish to Mr. Foster, Aug. 15, 1873. Moore, VI, 974 and July 15, 1875, Moore, VI, 980) that unrecognized insurgents (before a state of belligerency exists) are subject to the penal law, and that the failure to protect aliens against them or to punish them imposes liability on the constituted government.

The general rule is confirmed in numerous treaties between the states of Europe and the Latin-American republics (*infra*).

¹ *Dictum* by Ralston, Umpire, in *Sambiaggio (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 679.

² Their very weakness in maintaining a stable government, has, in fact, often been the actual if not the ostensible reason for imposing liability on some of the Latin-American states for injuries sustained by aliens in civil war. See Pradier-Fodéré, § 205, on the right of intervention.

³ *Sambiaggio (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 691.

⁴ Special report of W. E. Fuller, Spanish Treaty Claims Commission, G. P. O. 1907, p. 25. Rule 4 of the Principles of allowance, Final Report of the Commission, 1910, p. 6. The Commission made awards in two exceptional cases of the burning of claimant's property by insurgents after the Spanish officials had unjustifiably refused to allow the owners to remove it to a place of safety or had wrongfully prevented its removal. Rodríguez (No. 479) and Thorne (No. 248), Final Report, p. 12. Government negligence was proved in Tuinuca (No. 240), *ibid.* 11. Samuel B. Crandall in 4 A. J. I. L. (1910), 818. Mr. Uhl to Mr. Springer, July 1, 1895, For.

The burden of proof is on the claimant.¹ International commissions have enforced this rule, notwithstanding the difficulty of proving governmental negligence. In mob violence cases, on the other hand, notwithstanding the general rule of evidence, the government has generally been held to prove due diligence.

The rule of non-liability for injuries sustained in civil war extends to those inflicted during actual hostilities or by the agents or authorities of the government in the actual suppression of the revolution and admittedly necessary to that end, but is confined strictly to injuries inflicted in belligerent action against the insurgents. The titular government is accorded the free exercise of war rights. Thus it may, without incurring liability, prevent communication with the revolutionists,² provided the measure does not violate the rules of war.

The government is liable for violations of the rules of war and particularly for wanton acts of pillage and incidental occupation of neutral property by government soldiers.³ The legitimate government is not

Rel., 1895, p. 1216. See also Rule 8 of the Nicaraguan Mixed Claims Commission 1911.

¹ *Revesno et al. (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 753; Mr. Bayard, Sec'y of State, to Mr. Sutphen, Jan. 6, 1866, Moore's Dig. VI, 964.

² Case of brig *Toucan*. Brazilian indemnity, Jan. 24, 1849, Moore's Arb. 4615. A paper blockade, however, will not be recognized. *Infra*, note 6, page 234.

³ See principles 5 and 11 of the "Principles of Allowance" of the Spanish Treaty Claims Commission, Final Report, 4, 5, and awards, p. 10. See Rule 44 of Lieber's Rules, Halleck, II, 59. See also Cobham (Gt. Brit.) *v. Venezuela*, Feb. 13, May 7, 1903, Ralston, 409; *Upton (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 173; *Deebs claim v. Colombia*, For. Rel., 1907, I, 287; Anglo-Chilean Tribunal decisions, For. Rel., 1896, 35. Liability for acts of government forces is sometimes admitted by treaty (Treaty between Spain and Venezuela, Aug. 12, 1861, 53 St. Pap. 1051), and implied where the government is relieved by treaty from liability for acts of insurgents. Admission of Canalejas in reference to claims of the Powers *v. Spain*, account of insurrection in Cuba, 39 *Clunet* (1912), 675. See also *American Electric and Mfg. Co. (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 35. (Destruction by revolutionists of neutral property occupied by government troops). See also *Putegnati's heirs (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3720. Mr. Sherman, Sec'y of State, to Mr. Dupuy de Lôme, August 11, 1897, For. Rel. 1897, 520. After the revolution of 1911, China was held liable practically as a guarantor for all wanton destruction by either side, and even for destruction of property in the course of belligerent operations. Numerous awards were made by the Arbitrator of the Italian-Peruvian Commission under protocol of November 25, 1899, arising out of injuries inflicted by government troops, which he attributed to negligent failure to protect the property of neutrals.

in general liable to the neutral owners of property destroyed by the government troops while in the hands of rebels, for it has then become enemy property subject to destruction.¹ Where the government, however, receives a benefit from neutral property taken from the rebels, originally seized by the latter, equity requires, it has been held, that it should pay for the property² and for injuries sustained by the property through the unusual use to which it has been subjected while in government hands.³ The Spanish Treaty Claims Commission made awards for the seizure and use by Spanish forces of private property in Cuba, regardless of the purpose of the appropriation, whether to satisfy the needs of the army or to prevent its falling into the hands of the enemy.⁴ The government is bound to make compensation for the use of neutral vessels in its ports, and for their detention for purposes of the war. This exercise of the right of angary and embargo is often regulated by treaty.⁵ A state is also liable for injuries sustained by aliens in closing, by proclamation, a port in the control of the insurgents,⁶ a violation indeed of the laws of blockade. In this connection, it may be noted that the distinction between a state of war and a state of insurrection has important consequences with respect to foreign countries,⁷ but in the matter of closing ports in the hands of insurgents, only an

Descamps & Renault, *Rec. int. des traités du xx^e siècle*, 1901, Chiessa, p. 707; Sassarego, 708; Sanguinetti, 713; Vercelli, 717; Quierolo, 718; Valle, 721; and others.

¹ Barrett (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 2900. See also case of Walker, *ibid.* 2901.

² Mazzei (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 693.

³ Bonti (U. S.) *v.* Mexico, July 4, 1868, Opinions, 718 (not in Moore). Agnoli, Italian commissioner in the Guastini case, *supra* (Ralston, 737) contended for the construction that such property was not enemy property, relieving government from liability for its return.

⁴ The general rule relieves the government of liability for neutral property destroyed to prevent its falling into the enemy's hands. Notwithstanding that this was the purpose, the Commission made awards if the property was used (Final Report, 12, 13). See also Rule 4 of Nicaraguan Mixed Claim Com., 1911.

⁵ Bonfils, § 328; *Chepica* (Gt. Brit.) *v.* Chile, For. Rel., 1896, 38.

⁶ Rule 1b of the Institute, 18 *Annuaire*, 254, Wharton, III, § 361, Moore's Dig. VII, §§ 1270-1271; De Caro (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 810; *Comp. Gen. des Asphaltes* (Gt. Brit.) *v.* Venezuela, Ralston, 337, and authorities there cited. As to illegal warning off from ports in hands of insurgents, see *Boyne and Monmouth* (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 3923.

⁷ Moore's Dig. I, 166, 167.

effectively established blockade need be recognized by foreign powers. This does not affect the right of states, in time of peace, and under appropriate circumstances, to designate the ports within their control which shall be open or closed to commerce.

§ 94. Limitations on General Rules. Effect of Recognition, Continued Residence, Participation and Amnesty.

It will now be proper to examine certain limitations on the general rules governing state responsibility for injuries occurring in civil war. These arise out of (1) the recognition of the belligerency of the insurgents by the parent state or by foreign governments, or the existence of actual belligerency; (2) the continuation of domicile by a foreigner in the territory in insurrection; (3) participation in the rebellion on the part of a foreigner; and (4) the effect of amnesty.

Recognition, by the parent government, of the belligerency of insurgents against it or the existence in fact of a state of war releases the state from responsibility for all acts of the insurgents subsequent to the recognition. Recognition by some foreign governments only, operates as a release as against their subjects, and other non-recognizing powers are not necessarily bound. Recognition by the parent government is usually tacit and indirect only. The rule that the government is responsible for such acts of insurgents as were perpetrated through its own negligence is, therefore, suspended by the act of recognition. Formal recognition is not, however, necessary to raise insurgency to the plane of belligerency. Belligerent rights may be acknowledged without recognition and this is usually the case on the part of the parent government.¹ In the Civil War, for example, the non-responsibility of the United States resulted not from the recognition of the belligerency, but from the fact of belligerency itself, whether recognized or not by other governments.² The importance of establishing the fact of or a recognition of belligerency is therefore great. Up to that point the government may treat the rebels as traitors and criminals

¹ Mr. Fish, Secretary of State, to Mr. Foster, Minister to Mexico, Dec. 16, 1873, Moore's Dig. VI, 976. The Spanish Treaty Claims Commission took judicial notice of the fact that the insurrection in Cuba passed from the first beyond the control of Spain, and that war in a material sense existed.

² *Prats (Mexico) v. U. S.*, July 4, 1868, Moore's Arb. 2886.

and apply to them its penal law,¹ and is subject to such responsibility as arises out of a proven want of diligence to prevent their acts, and in some cases, it has been held, out of the failure to punish the guilty offenders.² There is some support for the doctrine which has been advanced that a government can avoid responsibility for the acts of insurgents by extending recognition or treating them in fact as a belligerent party.³ After recognition of belligerency begins, the parent government is no longer liable, under any circumstances, for any of the acts of unsuccessful insurgents,⁴ nor for its own failure to act wherever the insurgent power extends. If the revolutionists are successful, as will be seen, the government created through their efforts must assume responsibility for their acts. Recognition does not affect the liability of the parent government for the acts of its own agents and authorities. The seizure of neutral property by regular government forces or depredations by officered soldiers of the government impose liability upon the state at all times.

The effect of a continuous residence by aliens in the territory rent by civil war is to place them for practically all purposes in the same legal position as nationals. By remaining, they assume the risk of injury, within the limitations prescribed by the rules of war. No doctrine

¹ Although the government on principle may treat rebels as it sees fit, the United States intervened in Nicaragua in behalf of Cannon and Groce (two American adventurers fighting with the rebels), demanding indemnities for their summary execution by the parent government, on the ground that the laws of war had been violated in their execution without trial—and this notwithstanding the fact that the rebels were not recognized by anyone as belligerents. 4 A. J. I. L. (1910), 674; 35 Law. Mag. & Rev. (1910), 203.

² *De Brissot (U. S.) v. Venezuela*, Dec. 5, 1885, Opinions of Commission, 481-482, Moore's Arb. 2949, 2968; *Venezuela Steam Transportation Company (U. S.) v. Venezuela*, Moore's Arb. 1693 (acts due to government negligence and impliedly ratified); *Montijo (U. S.) v. Colombia*, Moore's Arb. 1421 (piratical acts of insurgents not punished). Mr. Fish, Sec'y of State, to Mr. Foster, July 15, 1875, Moore's Dig. VI, 980. Cases of this kind, where the uprising was for political ends, must be considered as exceptional.

³ Rougier, *op. cit.*, 478.

⁴ Mr. Adams, Minister to England, to Mr. Seward, Sec'y of State, June 14, 1861, Moore's Dig. VI, 956; 18 Annuaire, 255; Westlake, I, 50-57; Dana's Wheaton, note 15; Phillimore, II, ch. IV, p. 20; G. G. Wilson, Insurgency and international maritime law, 1 A. J. I. L. (1907), 46-60; Wharton, I, § 69; Moore's Dig. I, 164 *et seq.*; *The Three Friends*, 166 U. S. 1, 63.

is more strongly emphasized by Latin-American publicists than the general principle that aliens coming to and settling in a country must normally share its fortunes, and have no claim to better treatment than nationals. In the case of injuries occurring during civil war, without fault¹ of the authorities, the United States has been more observant of this principle than the countries of Europe.² In 1888, Mr. Bayard said:

"It is the duty of foreigners to withdraw from such risks and if they do not, or if they voluntarily expose themselves to such risks, they must take the consequences."³

Such was the position assumed by the United States in the Civil War. It has been upheld by international commissions⁴ and would under ordinary circumstances probably represent the position of the United States. To visit a locality in a state of insurrection is an assumption of and voluntary exposure to the risks involved.⁵

Aliens who participate in an insurrection should and do generally forfeit the protection of their own government. Aliens giving aid and comfort to the Confederates were excluded from the right to compensation before the domestic and international commissions sitting after the Civil War. A similar rule was applied in Colombia and other Latin-American republics in their domestic commissions and by the Spanish Treaty Claims Commission.⁶ Such participation is a palpable

¹ *E. g.*, Seijas, IV, 5-17; 507 *et seq.*, with citation of numerous authorities in support.

² Seijas, III, 311.

³ Mr. Bayard, Sec'y of State, to Mr. Sutphen, Jan. 6, 1888, Moore's Dig. VI, 963.

⁴ Strong, Arbitrator in *Gelbtrunk (U. S.) v. Salvador*, For. Rel., 1902, 873, 878; Upton (*U. S.*) *v. Venezuela*, Feb. 17, 1903, Ralston, 172, *dictum* by Bainbridge, Commissioner; Morris's Report, 389.

⁵ Negrete's claim *v. Spain*, Mr. Bayard, Sec'y of State, to Mr. Sutphen, Jan. 6, 1888, Moore's Dig. VI, 964; Patterson (*U. S.*) *v. Mexico*, Mar. 3, 1849, Moore's Arb. 1779; Decision of the British-Haitian commission of 1872, Baty, 161. See Lord Granville's reply to British subjects resident in France who protested against requisitions during the Franco-Prussian War. Atlay's Wheaton, § 151, J; Phillimore, II, 6; Leval, Protection diplomatique, §§ 105, 106.

⁶ Caldwell (No. 283) and Jova (No. 122), where claimants admitted voluntary enlistment in the Cuban forces. But payments to insurgents for permission to remove claimant's cattle (Iznaga, No. 111) or lumber (Bauriedel, No. 239), being considered necessary, did not affect claimant's standing. S. B. Crandall in 4 A. J. I. L. (1910), 822. The United States interposed in the Cannon and Groce affair in Nicaragua, *supra*, on the ground that its citizens were denied the rights of civilized warfare.

forfeiture of neutrality. Several treaties between European and Latin-American countries provide expressly that aliens taking part in civil wars or insurrections or undertaking political office forfeit their exemptions and privileges as foreigners and are to be treated as natives.¹

The effect upon the liability of the government of an amnesty to the rebels is somewhat uncertain. When the government has treated the rebels as criminal offenders, and they did not attain the status of revolutionists, an amnesty operates as a pardon and constitutes a failure to punish criminals, a recognized ground of state responsibility. So in the *Montijo* case, the umpire, Bunch, held the government liable, particularly because the grant of the amnesty deprived the claimant of the power of trying the responsible rebels for the injuries inflicted.² Secretary Fish applied the same rule to Mexico, there having been no recognition of belligerency,³ and, as has already been observed, the failure to punish was one of the principal grounds of liability in the de Brissot and Venezuelan Steam Transportation Company cases (*supra*, p. 218). The failure to prosecute the rebels, but on the contrary their appointment to office under the government, was considered as a tacit approval of their acts and an assumption of liability on the part of the government.⁴ In the Wenzel case before the German-Venezuelan Arbitration of 1903, an amnesty unconstitutionally granted was held without effect.⁵

¹ See, for example, treaty between Spain and Peru, July 16, 1897, Article 5, 89 St. Pap. 598. This rule has been adopted in the constitutions and municipal law of most of the states of Latin-America. *Infra*, § 391.

² Although the umpire stated that there was a "stronger reason" for holding Colombia liable. (*U. S. v. Colombia*, Moore's Dig. VI, 974.) As a matter of fact, the offenders rose to the dignity of insurgents. In the de Brissot case, Little drew a distinction between acts of war and lawless acts of armed bands, even acting with a political object. The failure to punish in the latter case imposed liability on the government. (*de Brissot*, Moore's Arb. 2967).

³ Moore's Dig. VI, 974.

⁴ *Bovallins v. Hedlund* (Sweden) *v. Venezuela*, March 10, 1903, Ralston, 952. Agnoli, the Italian commissioner in Guastini (Italy), *v. Venezuela*, Ralston, 730, 737, tried to show that the extending of a pardon to the Hernandez revolutionists and giving them office threw on the government the responsibility for their acts. Umpire Ralston, however, held Venezuela not liable.

⁵ *Wenzel* (Germany) *v. Venezuela*, Feb. 13, 1913, Ralston, 590. The inference is that if constitutionally granted it would have made the government liable.

In several important cases, however, the granting of an amnesty to rebels has been held not to constitute an assumption of liability for their acts. This has been the case in the United States for the acts of the Confederates, and in Mexico,¹ and on principle, appears to be the better rule. As a practical matter, it is not always easy to distinguish between a movement on such a small scale as to amount to a conspiracy or plot against the established government, punishable by municipal law, and a general movement assuming the proportions of an armed contest against the government, of which international law takes notice by recognizing a status of insurgency, manifested in various ways, *e. g.*, a warning by foreign governments to their subjects to abstain from participation. While as a matter of strict right the government may treat the insurgents as criminals, modern practice tends to regard them as belligerents, with rights as such, provided they observe the rules of legitimate warfare.

§ 95. Insurgents in Temporary Control of Limited Areas.

Much difficulty is created by the case of insurgents controlling a part of a territory in insurrection and exercising authority over the area they control. The question has arisen in connection with forced loans and the collection of customs dues by such temporary authorities. Whether the general government is bound by their acts depends upon the extent to which they have become *de facto* authorities.² The general tests of a *de facto* government have already been considered (*supra*, p. 210).

Secretary Fish, in 1873, asserted the liability of Mexico for forced loans levied by insurgents, basing the contention on the stipulation of the treaty of 1831 with Mexico.³ Treaties of the United States with most of the countries of Latin-America exempt American citizens

¹ British-U. S. commission of 1871; French-U. S. commission of 1880; Devine (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 2980, Opinion by Thornton, umpire.

² Wharton, II, 577, § 223.

³ Mr. Fish, Sec'y of State, to Mr. Foster, Aug. 15, 1873, Moore's Dig. VI, 916; see also Mr. Cadwalader to Mr. Foster, Sept. 22, 1874, who did not even base the contention upon a treaty, *Ibid.* 917. Secretary Evarts did not construe the treaty to forbid forced loans. Mr. Evarts, Sec'y of State, to Mr. Scott, April 17, 1877, Moore's Dig. VI, 917.

from forced loans, and it is probable that the general government will be held liable for the exaction of such a loan by *de facto* authorities exercising jurisdiction over a certain area, whether an insurgent faction or not.¹

The legitimacy of the collection of customs dues and other taxes by insurgents in control of a certain area depends, similarly, upon the extent to which they are temporarily *de facto* authorities. If they are in exclusive control the legitimate government has no right to demand second payment of taxes. "Money paid to the *de facto* authorities"—it was said in the case of *Guastini*—"in the shape of public dues, must be considered as lawfully paid, and receipts given by them regarded as sufficient to discharge the obligations to which they relate. Any other view would compel the taxpayer to determine at his own peril the validity of the acts of those executing public functions in a regular manner."² The United States has always insisted that a payment to *de facto* authorities releases the taxpayer from a second payment, especially where made under protest.³ Where the so-called insurgents have not become actual *de facto* authorities, but have, nevertheless, in the character of organized marauders rather than political factions, collected dues, the rule as to second collections has not been uniform. To abstain from demanding a subsequent payment to constituted authorities becomes rather a matter of gracious remission of duties to which the titular government has a right.⁴ All the circumstances

¹ See case of *Fowks v. Peru*, For. Rel., 1901, 430-434 (although the revolutionists in this case eventually became successful).

² *Guastini (Italy) v. Venezuela*, Ralston, 750; *Santa Clara Estates (Gt. Brit.) v. Venezuela*, *ibid.* 397; *De Caro (Italy) v. Venezuela*, *ibid.* 819. See the famous case of *U. S. v. Rice* (the *Castine* collections), 4 Wheaton, 246, Opinion by Story; *MacLeod v. U. S.* (1913), 229 U. S. 416, 429. *Supra*, p. 208.

³ The compulsion to pay became important in a case in Colombia where the government by decree sought to compel merchants to refuse to pay rebels and, if they did, to pay the government again. (Moore's Dig. VI, 995.) The United States remonstrated against the decree. The decree was then limited to those who had voluntarily paid the insurgents. The United States contended that this *vis major* or compulsion was to be presumed unless the contrary was shown. See also *Suchet (France) v. Venezuela*, 9 R. G. D. I. P. (1902), 628; 8 *ibid.* 57.

⁴ Mr. Adee to Mr. Clancy, Mar. 6, 1899 (the *Bluefields* insurgents), For. Rel., 1899, 548, 558. In France it was held that payments to agents of an insurrection do not bind the legitimate government except so far as it admits this, and that it alone was

particularly the *de facto* character of the authorities collecting the duties, must be considered.

§ 96. Successful Revolution.

A successful revolution stands on an entirely different basis. The government created through its efforts is liable for the acts of the revolutionists as well as for those of the titular government it has replaced.¹ Its acts are considered as at least those of a general *de facto* government,² for which the state is liable from the beginning of the revolution, on the theory that the revolution represented *ab initio* a changing national will, crystallizing in the final successful result.³ Thus the government created through a successful revolution becomes liable for all services rendered to the revolutionists.⁴ The unlawful acts of successful revolutionists render the government equally liable.⁵

invested with the right to recognize or annul the acts of the insurgents. 25 Journ. du Dr. Adm. (1877), 233.

¹ Bolivar Railway Co. (Gt. Brit.) v. Venezuela, Feb. 17, 1903, Ralston, 394.

² Dix (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 7; Henry (U. S.) v. Venezuela, *ibid.* 14, 22.

³ Bolivar Railway Co. *supra*; Williams v. Bruffy, 96 U. S. 176. The award of the arbitral tribunal (Goode, U. S. commissioner, dissenting) in Didier (U. S.) v. Chile, Aug. 7, 1892, Shield's Rep., Washington, 1894, pp. 41, 45, seems altogether erroneous. The claim was based on a contract for supplies furnished in 1816 to the successful revolutionary party of Gen. Carrera. Because the protocol was concluded between the Republic of Chile and the U. S., the Commission, on demurrer to the jurisdiction, dismissed the claim on the ground that until 1822, when Chile was first recognized by the U. S., "Chile was *de jure* under Spanish domination so far as concerned the U. S." See also Commissioner Goode's dissenting opinion, *ibid.* 46-51. See the awards of the U. S.-Mexican commission of 1868 under identical circumstances, Moore's Arb. 1243; Tchernoff (*op. cit.*, 337) supports the Didier award.

⁴ Oteri claim v. Honduras, For. Rel., 1899, 352 (use of a steamer); Kummerow (Germany) v. Venezuela, Feb. 13, 1903, Ralston, 561; Redler (Germany) v. Venezuela, *ibid.* 560; Baasch and Römer (Netherlands) v. Venezuela, Feb. 28, 1903, *ibid.* 907. But it is not liable for military services rendered to the legitimate government in suppression of the very revolution which ultimately became successful. Mr. Blaine, Sec'y of State, to Mr. Patterson, April 7, 1890, Moore's Dig. VI, 624. It would seem that the Cuban government is liable for the acts of its revolutionary forces which established the government. China admitted its liability for the acts of the revolutionists which established the Republic.

⁵ Hill (U. S.) v. Peru, Dec. 4, 1868, Moore's Arb. 1655; Hughes (U. S.) v. Mexico, March 3, 1849, Moore's Arb. 2972; Hayball v. Peru, For. Rel., 1901, 427-430; Fowks

The successful revolutionists appear to be bound from the beginning of the revolution by the stipulations of national treaties, for the violation of which they will be held liable as successors to the titular government.¹

Governments have on numerous occasions voluntarily made compensation, as a matter of policy rather than as a matter of law, for the injuries sustained by natives and foreigners during civil war, limited generally to the injuries inflicted by government forces,² but sometimes extended to include the acts of both parties.³ If the nationals of any other foreign country were indemnified, the United States would probably insist upon equal treatment for American citizens.⁴

§ 97. Experience of Latin-America.

Various states of Latin-America, exposed as they have been to *con-*
v. Peru, For. Rel., 1901, 430-434; MacCord v. Peru, May 17, 1898, Moore's Dig. VI, 985-990. (These were cases of personal injury and unlawful imprisonment.)

¹ Fowks claim *v. Peru, supra*.

² Southern Claims Commission; British-American Commission of May 8, 1871; French-American Commission of Jan. 15, 1880. Indemnities were paid to loyal citizens and to foreigners who had not given aid and comfort to the Confederates. Haiti in 1902 paid claims resulting from the burning and pillage of Petit Goave, in 1902, by government forces. This has been Haiti's general practice.

³ France made payments for injuries during civil commotions in 1830, 1834, 1851, 1871 (Commune), 1882 (Saida), and 1893 (Aigues-Mortes). (Calvo, III, §§ 1291-1293.) Belgium made similar payments in 1831, 1836, and in 1842, during which only the "needy ones" were provided for (Calvo, § 1294). Spain voluntarily paid French citizens at the end of the Carlist war in 1876. [Despagnet, 4th ed. 470; 15 Clunet (1888), 293.] The Khedive of Egypt compensated those sustaining injuries during the bombardment of Alexandria in 1882. (Moore's Dig. VI, 984; 71 St. Pap. 556; 74 St. Pap. 684.) Indemnities paid by Morocco for damages during disturbances in Morocco. (Despagnet, 470.) Latin-American states have occasionally by domestic commission voluntarily made compensation for injuries suffered during insurrections. Mexico in 1860, 51 St. Pap. 617; Hayti in 1884, 76 St. Pap. 302; Venezuela in 1868, 59 St. Pap. 1291; Venezuela in 1901, at the end of the Castro revolution (For. Rel., 1901, 550); Peru in 1871 for the injuries incurred in the sacking of Callao (Moore's Dig. VI, 973; 65 St. Pap. 1247); and Colombia on several occasions: In 1875 (Moore's Dig. VI, 981), seizure of certain steamers by insurgents; by certain decrees of 1877 and 1878 (68 St. Pap. 776; 69 *ibid.* 376); by law of Aug. 31, 1886 and Oct. 11, 1886 (77 St. Pap. 807, 810); by decree of Oct. 17, 1903 (98 St. Pap. 839). Mexico after the revolution of 1911 established a Consultative Claims Commission to adjudicate upon claims.

⁴ Mr. Olney, Sec'y of State, to Mr. Thompson, Min. to Brazil, Jan. 20 and Oct. 10, 1896, Moore's Dig. VI, 892.

stant revolutionary movements, have on numerous occasions been subjected to liability by the countries of Europe for the injuries inflicted by insurgents or during civil war. This has been in part explained by the fact that the continuous state of revolutionary unrest takes these uprisings out of the category of fortuitious events, which the government is unable, by due diligence, to prevent.¹ The European nations, in supporting claims arising out of these civil wars, regardless of whether insurgents or authorities caused the injury,² have sometimes taken the ground that the responsibility of the state is due to a lack of diligence in preventing or suppressing uprisings. This ground could hardly be general, for "the highest interests of the state are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a foreign state."³ Moreover, if they were actually negligent, that fact would be extremely difficult to prove, and if the claims rested upon this ground alone few of them could be prosecuted to payment. As a matter of fact, the ground is, as a rule, advanced for plausibility alone, and assuming that the government is so organized that civil commotion is only a fortuitious event and not one invited by lack of proper political organization, the Latin-American republics would appear to deserve support in their endeavors to be relieved from the diplomatic pressure of claims resulting from injuries suffered in the legitimate operations incident to civil war, or caused by insurgents.

¹ H. Arias in 7 A. J. I. L. (1913), 746. See also Lawrence's Wheaton, 176.

² The following have been some of these occasions: France and Great Britain *v.* Argentine, 1858, 48 St. Pap. 28; 49 *ibid.* 1340; France *v.* Brazil, 22 Clunet (1895), 925; 1 R. G. D. I. P. (1894), 164, 2 *ibid.* (1895), 340; Belgium, France, and Italy *v.* Venezuela (civil war of 1892), 2 R. G. D. I. P. 344; Great Britain, France, Italy, Spain, Germany and U. S. *v.* Chile at the end of the 1891 civil war, 1 R. G. D. I. P. 164 and 171; 2 *ibid.* 338; 3 *ibid.* 476; 4 *ibid.* 416; Moore's Arb. 4862, 4930; Italy *v.* Brazil after war of 1893, Documenti diplomatici, Brasile reclami italiani, Dec. 6, 1894; 4 R. G. D. I. P. (1897), 403, 463; Italy *v.* Salvador, Feb. 4, 1876, 70 St. Pap. 493; Italy *v.* Peru, Nov. 25, 1899, Memoria de Relaciones Exteriores, 1900, 645; Spain *v.* Mexico, Article 4 of treaty of 1853, Tchernoff, 341; 28 Rev. de derecho, 310; Greece *v.* Salvador, 29 Clunet (1902), 656; Several powers *v.* Venezuela, in 1903, secured an admission of liability in the protocols, *supra*; Basdevant in 11 R. G. D. I. P. (1904), 362.

³ Hall, 6th ed., 220; Fiore, § 673 *et seq.*; Pillet, Les lois de la guerre, 29; Wiesse, *op. cit.*, § 14; Leval, § 103; Pittard, 281.

In order to avoid this pressure of claims arising out of civil wars, the Latin-American states have succeeded in concluding numerous treaties with European nations by which the latter admit the non-liability of the government for injuries sustained by their subjects in civil war at the hands of revolutionists or savage tribes, provided the damage is not caused through the fault or negligence of the authorities of the government.¹ The states of Latin-America have among themselves concluded treaties providing for absolute non-liability, whether the injuries sustained by their respective citizens are due to the acts of insurgents or legitimate authorities.² The Latin-American states have resorted to other methods to avoid the presentation of claims by foreigners for injuries sustained during civil war. In the resolutions of the Pan-American Congresses, in their constitutions, and in their statutes, they have provided that the alien taking part in a civil struggle shall be treated as a native and shall lose his privileges of alienage.³ These municipal regulations provide generally that the alien shall have the same civil rights as the national and shall have the right to the diplomatic protection of his own country only in the event of a denial of justice after an exhaustion of local remedies.⁴ These

¹ Such treaties have been concluded between France and Mexico, Nov. 27, 1886, art. 11 Martens' Recueil des traités, 65, 843; 77 St. Pap. 1090; France and Colombia, May 30, 1893, For. Rel. 1894, 200; 84 St. Pap. 137; Belgium and Mexico, June 7, 1895, art. 15, Martens, 73, 73; Belgium and Venezuela, March 1, 1884, art. 18, Martens, 61, 620; 75 St. Pap. 39; Germany and Colombia, July 23, 1892, art. 20, Martens, 69, 842; 84 St. Pap. 144; Germany and Mexico, Dec. 5, 1882, art. 18; Martens, 59, 474; Italy and Colombia, Oct. 27, 1892, art. 21, Martens, 72, 313; Italy and Mexico, Apr. 16, 1889, Apr. 16, 1890, art. 12, Martens, 68, 711, 771; Italy and Venezuela, July 19, 1861, art. 4, 54 St. Pap. 330; Spain and Colombia, Apr. 28, 1894, art. 4, Olivart, Tratados de España, 11, 64; Spain and Ecuador, May 23, 1888, art. 3, Olivart, 9, 27; 79 St. Pap. 632; Spain and Honduras, Nov. 17, 1894, art. 4, Olivart, 11, 156; Spain and Peru, July 16, 1897, art. 4, Olivart, 12, 348; 4 R. G. D. I. P. (1897), 725; and art. 4 of treaty of Aug. 14, 1897, *ibid.* 794-797; Spain and Venezuela, Aug. 11, 1861, 53 St. Pap. 1050; Sweden and Mexico, July 29, 1885, art. 21, Martens, 63, 690.

² Arias in 7 A. J. I. L. (1913), 756; Podesta Costa in 42 Rev. de derecho hist. y let. (1912), 511, note.

³ This provision has been incorporated in one or two treaties with European countries—*e. g.*, Spain and Peru, Aug. 14, 1897, art. 3, 2 R. G. D. I. P. (1895), 342; 4 *ibid.* (1897), 794; Belgium and Venezuela, March 1, 1884, art. 8, Busschere, A. de, Code de traités . . . interessant la Belgique, Bruxelles, 1897, II, 434.

⁴ These municipal provisions as well as the treaties concluded by a few European

provisions of municipal law, as will be more fully noticed hereafter, have been ineffectual in relieving the states of Latin-America from the fulfillment of what have been conceived, by the stronger powers, to constitute their international obligations.

countries with Latin-American states acknowledging the principle of limited diplomatic protection are discussed, *infra*, § 391. See also article by Arias in 7 A. J. I. L. (1913), 757 *et seq.* The Institute of International Law has declared itself as opposed to the clauses of reciprocal irresponsibility on the ground that they relieve states from the duty of protecting the foreigner in their territory. It believed that states which, through a series of extraordinary circumstances, do not deem themselves to be in a position to insure in a sufficiently effective manner the protection of foreigners in their territory, cannot withdraw themselves from the consequences of such a state of things except by a temporary interdiction of their territory to foreigners. (18 *Annuaire*, 253, translated in *Ralston's International arbitral law*, 234.)

CHAPTER VI

INTERNATIONAL RESPONSIBILITY OF THE STATE—Continued. WAR CLAIMS

§ 98. Belligerent and Private Rights.

Any attempt to discuss the international responsibility of the state for injuries sustained by private individuals in time of war immediately encounters the difficulty of establishing any definite rules in the practice of awarding indemnities or compensation for private losses arising out of war. Nevertheless, an examination of the subject in the light of precedent and principle may not be without some useful results.

In a general way, this responsibility of the state may be measured by the state's obligation as a belligerent or a neutral to observe the rules of international law and of war. As it is obviously, however, beyond present possibilities to undertake a detailed review of these rules—which indeed have been ably treated in numerous works on the subject—the discussion here will be confined to the more important classes of cases in which pecuniary claims have been or are likely to be brought for injuries sustained by individuals or private property in time of war.

At the outset it may be observed that in the progress of time private rights during war have gained greater and greater recognition, coincident with the narrowing of the sphere of belligerent rights, the imposition of more stringent rules for the conduct of war, and the enlargement (until the outbreak of the present European War) of the rights of neutral commerce. It is in the matter of injuries sustained by private persons during war that Rousseau's somewhat inexact doctrine that war is a relation of state to state and not of man to man has found perhaps its greatest field for application, for both in international and municipal law there has been a marked and growing tendency to relieve individuals and their property from the losses incident to war and to cast the burden upon the state. While this modern principle

of state indemnity is to a large extent a matter of municipal law and national policy and equity only, international law has endeavored in many directions to preserve the immunity of private rights from the destructive effects of war. Nevertheless, although the conduct of warfare has in increasing degree been brought within definite rules, private property rights necessarily cannot be safeguarded so minutely or be affected with the fine distinctions incident to civil affairs. A margin of uncertainty is hardly separable from a sphere of rights in which so much depends on military necessity.

§ 99. Theory of Compensation for War Losses.

Before discussing the particular phases of war claims, it seems desirable to take up briefly the general question of compensation for individual war losses. In former times, no rules existed for pecuniary indemnity to individuals for war damages. In the matter of the state's duty to indemnify its own subjects, Vattel appears to have been the first to draw a distinction between the different kinds of war losses. He distinguished, first, those caused by the enemy, for which no indemnity was due; and, secondly, those caused by the state itself. The latter he subdivided into two classes: first, losses caused by the voluntary and deliberate action of the army by way of precaution or strategy; and, secondly, inevitable accidents of war caused either by stress of circumstances or without premeditation. For losses coming within the last subdivision, the state incurred no strict obligation, although, if its finances allowed, it was equitably proper to compensate individuals. For losses within the first subdivision, it was bound to give indemnities at the close of the war.¹ This distinction between acts done voluntarily in preparation for war, and injuries inevitable or inflicted only by imperious military necessity has been followed by France and the French courts² from the period beginning with the French Revolution, and

¹ Vattel, Chitty-Ingraham ed., § 232, p. 402; Bentwich, N., Private property in war, London, 1907, 41-42; H. Rep. 386, 22nd Cong., 1st sess., pp. 9-10; Lawrence's Report on claims against governments, H. Rep. 134, 43rd Cong., 2nd sess., 126; Nys (1912 ed.), III, ch. XI, 450-462.

² Brémont in article "Actes de gouvernement," 5 Rev. Dr. Pub. (1896), 69, 227; Meignen, E., La guerre, Pillages, destructions, dommages, 5th ed., Paris, 1914, 36 p. As to Italian law to the same effect see H. Rep. 134, 43rd Cong., 2nd sess., 129, 135-191; Tchernoff, *op. cit.*, 309 *et seq.*

the principle of state indemnity has thus found its way into modern practice. Attention will be called hereafter to a number of special occasions on which large voluntary indemnities have been granted by various states to inhabitants sustaining war losses.

The matter of exacting pecuniary indemnity on behalf of injured private individuals from belligerent or neutral states violating the laws of war is of comparatively recent origin. The rule of indemnity was developed by international commissions and domestic boards as the only practical sanction for a violation of those private rights which international and municipal law have expressly sought to safeguard. At the Second Hague Conference, it was for the first time definitely provided (Art. 3 of Convention IV): first, that a belligerent in land warfare who violates the provisions of the Hague Regulations, shall, if the case demand, be liable to make compensation; and secondly, that he shall be responsible for all acts committed by persons forming part of his armed forces.¹ It is probable that the first rule extends to all violations of the laws of war besides those included in the Hague Regulations. Whether the second rule will serve hereafter to make the state liable for the wanton or unauthorized acts of unofficered soldiers, for which, under an almost uniform practice, the state has heretofore been held not to be responsible, is a grave question.

§ 100. A State of War.

The measure of private rights in war and the extent to which they are subject to belligerent rights depends on the existence of a state of war, and not on a declaration of war or a recognition of belligerency. The indicia of a state of war may be said to be an armed contest between two states or parts of the same state conducted by regularly organized military bodies and having an avowed political object in view. War may exist where no battle has been or is being fought,²

¹ Oppenheim, 2nd ed., II, 300, 319-321. One of the best discussions of Art. 3 of Convention IV is to be found in a small work by Cuno Hofer, *Der Schadenersatz im Landkriegsrecht*, Tübingen, 1913, 91 p.

The Institute of International Law at its Oxford meeting of 1913, proposed to extend the principle of indemnity to naval warfare. Additional Article to Rules adopted, 15 R. D. I., n. s. (1913), 677.

² *Ex parte* Milligan, 4 Wall. 127, 140. Upon the question whether war exists, the

as well as when war has not been declared nor belligerency recognized.¹ War, then, is a fact, and the rights and duties of individuals, as well as the exercise of belligerent rights by enemy governments or by parties to a civil war result from the *fact* of belligerency alone.² Thus, while the Cuban insurgents were never granted belligerent rights, the Spanish Treaty Claims Commission nevertheless held that war existed in a material, if not in an international, sense, thereby granting to Spain and to the insurgents the right to exercise belligerent rights and immunity for such injuries to private persons and property as the laws of war permit.³ The determination that no legal state of war existed between the United States and France between 1798 and 1800 was vital to the decision of the Court of Claims in the French Spoliation claims.⁴

It is equally necessary to determine when belligerent rights end. This is usually, though not always, fixed at the date of a treaty of peace, but in fact a treaty is not in effect until ratified and proclaimed, and belligerent rights have often been exercised (1) between the date of signing and ratification, and (2) in the case of military forces in distant colonies, after the date of ratification. If the armistice which is usually provided for in the first case is broken, or if in the second case belligerent rights are exercised after knowledge of the cessation of the war by the military commanders, liability would seem to attach to the offending government.⁵

courts must follow the political departments of the government. *Gray v. U. S.*, 21 Ct. Cl. 340; *Cushing v. U. S.*, 22 Ct. Cl. 1. See also G. G. Phillimore in 4 Journ. of the Soc. of Comp. Leg. (1902), 128-134.

¹ The Prize Cases, 2 Black, 636, 670; *Teresa Jeorg v. U. S.*, Spanish Treaty Cl. Com., Briefs, v. 2, pp. 80, 81.

² Hall, 31 and note. *Prats (Mexico) v. U. S.*, July 4, 1868, Moore's Arb. 2886, 2888.

³ *Span. Treaty Cl. Com.*, Special Rep. of W. E. Fuller, 1907, 22; Sen. Doc. 308, 59th Cong., 1st sess., 26.

⁴ *Gray v. U. S.*, 21 Ct. Cl. 340; *Cushing v. U. S.*, 22 Ct. Cl. 1; The French Spoliation Claims, by Geo. A. King, Sen. Doc. 964, 62nd Cong., 3rd sess., 9.

⁵ Oppenheim, 329; Hall, 6th ed., 555. The decisions of arbitral and other courts, however, leave this question in much uncertainty. *John (U. S.) v. Gt. Brit.*, Feb. 8, 1853, Moore's Arb. 3793 (government held liable for capture made after signing of treaty of peace, on ground of failure to notify the cessation of hostilities promptly). See also the *John*, 2 Dodson, 336 and the *Mentor*, 1 Rob. 183. The Japanese government ordered the release of "all ships and their cargoes captured after Sept. 5,

It is often important to determine, on the military occupation of a town or larger area, when belligerent rights merge into the more limited rights of a military occupant.¹

In the case of maritime capture the question has occasionally been raised whether neutral vessels, captured before the treaty of peace, can be tried or condemned in a prize court after the conclusion of peace. Inasmuch as title in the captured vessel, or cargo does not pass until actual condemnation, there is some ground for the view that a prize, captured but not yet condemned when peace is concluded, must be released. While the matter must still be regarded as a moot question, the weight of authority, supported by the celebrated *Doelwyk* decision of the Italian Prize Commission,² favors the view that the neutral prize may be tried after peace is concluded.³ Whether the prize may be condemned and confiscated is more doubtful. While some eminent authorities maintain that condemnation after peace is lawful, inasmuch as it is a punishment for an unlawful act committed before the peace,⁴ the Italian court in the *Doelwyk* case decreed the restoration of the vessel on the ground that condemnation and confiscation after peace is unlawful.

§ 101. Position of Aliens in Hostile Territory.

Without entering into a discussion of the general position of aliens in time of war, a subject which has already received some consideration (*supra*, § 46) it is necessary to examine the principal burdens which

1905" (the date of the treaty of peace with Russia). Imperial Ordinance No. 228, November, 1905. But see case of the *Swineherd*, captured by a French privateer after knowledge (though not official notification) of cessation of war. She was condemned by a French prize court. Hall, 556, criticizes the decision. See also Phillimore, III, § 521. See also cases of *Torres (Mexico) v. U. S.*, July 4, 1868, Moore's Arb. 3798; *Ayama, ibid.* 3804; *Serrano, ibid.* 3805 (where a claim was allowed); and *Revilla, ibid.* 3805.

¹ *Meng (France) v. U. S.*, Jan. 15, 1880, Moore's Arb. 3689; *Gumbes v. An award of the commissioners for liquidating the claims of British subjects on France (1834)*, 2 Knapp P. C. Rep. 369; *Maccas* in 20 R. G. D. I. P. (1913), 230 *et seq.*

² Martens, Recueil, 2nd series, v. 28, 66-90.

³ Oppenheim, II, § 436.

⁴ *Ibid.*; Liszt, 5th ed., 374; Gareis, 2nd ed., 258; Brusa in 4 R. G. D. I. P. (1897), 157-175, criticizing the *Doelwyk* decision; decision of Japanese Prize Court in the *Antiope* case, Hurst and Bray's Russian and Japanese Prize Cases, London, 1913, II, 389-402.

individuals in hostile territory must bear. A long course of practice and the Hague Regulations have given some authority to certain rules for the treatment of alien enemies in the country of the territorial sovereign. But even a departure from these rules, which has occurred in several instances during the present European War, can hardly give rise to individual pecuniary claims in law. The alien enemy's individual grievances are settled by the treaty of peace, and if his country should happen to lose in the war, he is without redress. If his country should be the conqueror, indemnities may be demanded from the defeated nation, but his pecuniary remedy then depends on the bounty of his own state. In either case, he apparently has no legally protected rights, so that as between nations and alien enemies, the rules of war have only a moral and not a legal sanction. If the transgressor of the rules should be victor in the conflict, no legal means exists for compelling him to accord redress to injured alien enemies. While he may be held more accountable to neutral aliens, either as victor or vanquished, for certain transgressions of the rules of war, there are many respects in which neutral aliens domiciled in enemy territory share the burdens of war equally with alien enemies.

Neutral aliens domiciled in an enemy state, with their property there situated, are exposed to the consequence of actual belligerent operations to the same extent as subjects of the enemy.¹ This rule applies not only to aliens who permanently reside in a country, but to those who come with knowledge of the existence of the war, and particularly to those who came before the war and continue to reside for a period longer than necessary for convenient departure. Both with respect to his property and his capacity to sue such an alien is deemed an enemy.² Foreign Offices and municipal and international courts have frequently laid down the rule that neutral property permanently situated in enemy

¹ Hall, 740; Bentwich, 29. The rule that war makes subjects of one belligerent the enemies of the government and subjects of the other is admitted. It applies equally to civil and international war. See also *U. S. v. Cooke (The Venice)*, 2 Wall. 258, 274; *Mrs. Alexander's Cotton*, 2 Wall. 419; *Jecker v. Montgomery*, 18 How. 110; *White v. Burnley*, 20 How. 235, 249.

² Whiting's war powers under the Constitution, 43rd ed., Boston, 1871, p. 341. *Society v. Wheeler*, 2 Gallison, 105. The rule that aliens entering or continuing to reside in enemy territory may be treated as enemies is found in Grotius, III, 4, §§ 6, 7.

territory, or property of neutrals who voluntarily enter or continue to reside in belligerent territory assumes the risks of injury incident to war.¹ In strict law, even the property of loyal citizens situated in enemy territory is subject to the casualties of war as enemy property.² The particular liabilities to which such property is thus ordinarily exposed will be examined presently. It is here merely to be noted that on land, the fate of property situated in belligerent territory depends not on the nationality or loyalty of the owner, but on the location of the property.³ The only important qualification of this rule relates to neutral property *temporarily* in the belligerent country. If this is used or destroyed for recognized belligerent reasons, the owner is entitled

¹ Palmerston's opinion in Greytown, Copenhagen and Uleaborg bombardments. Hansard's Debates, 3rd series, v. 146, pp. 37, 49; Granville to Lord Lyons, Jan. 11, 1871 and Granville to Sackville West, March 1, 1871, Hale's Rep., Appendix, For. Rel., 1873, v. 3, 368-370, 65 St. Pap. 458.

Mr. Cass, Sec'y of State, to Mr. Burns, April 26, 1858, Moore's Dig. VI, 885; Mr. Seward to Mr. Wydenbruck, Nov. 16, 1885, *ibid.* 885; Mr. Fish, Sec'y of State, to Mr. Washburn, April 28, 1871, For. Rel., 1871, 335; Mr. Fish to Mr. Thornton, May 16, 1873, Moore's Dig. VI, 890; Mr. Fish to Mr. Gibson, Dec. 30, 1875, *ibid.* 891; Mr. Bayard to Mr. O'Connor, Oct. 29, 1885, *ibid.* 891; Whiting's war powers, 352; 12 Op. Atty. Gen. 21; 22 Op. Atty. Gen. 315. See also Wharton's Dig. III, §§ 352, 353.

Gallego, Mesa, *et al.* v. U. S., 43 Ct. Cl. 444; Herrera v. U. S., 222 U. S. 558.

Cooke (U. S.) v. Mexico, Act of March 3, 1849, Moore's Arb. 2659, 2661; Haggerty, *ibid.* 2665; Thompson, *ibid.* 2669; Castel (U. S.) v. Venezuela, Dec. 5, 1885, *ibid.* 3710; Foster (U. S.) v. Mexico, July 4, 1868, *ibid.* 3349; Costa (U. S.) v. Mexico, *ibid.* 3724; Tongue (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3675; Brook (Gt. Brit.) v. U. S., May 8, 1871, *ibid.* 3738 (Rule admitted, but award here made for property taken for military use, because loyal citizens had been granted compensation in similar cases. 16 Stat. L. 524). Same rule in Henderson (Gt. Brit.) v. U. S., *ibid.* 3827, Frazier dissenting in both cases, Hale's Rep. 43, 44; Laurent (Gt. Brit.) v. U. S., Feb. 8, 1853, *ibid.* 2671; Uhde, *ibid.* 2691; Bacigalupi (U. S.) v. Chile, May 24, 1897, Report, 1901, p. 151; Volkmar (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 258, 259; Upton (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 72; Orr and Laubenheimer (U. S.) v. Nicaragua, For. Rel., 1900, 826.

² Jaragua Iron Co. v. U. S., 212 U. S. 297, 306; Page v. U. S., 11 Wall. 268; Prize Cases, 2 Black, 635; *The William Bagaley*, 5 Wall. 377; U. S. v. Farragut, 22 Wall. 406; Green v. U. S., 10 Ct. Cl. 466; Gooch v. U. S., 15 Ct. C. 281; Brandon v. U. S., 46 Ct. Cl. 559.

³ 11 Op. Atty. Gen. 405; 12 *ibid.* 486, 488; Lawrence's Wheaton, 565. In practice indemnities are often paid for such loyal citizen's property as may have been used or destroyed by the citizen's own state. See Southern Claims Commission, Act of March 3, 1871, 16 Stat. L. 524.

to compensation, which is not the case with property permanently so situated. The right to use such neutral property, subject to payment of compensation, is known as the right of angary, quite analogous to the right of eminent domain.¹

§ 102. Enemy Character.

The belligerents are entitled to exercise certain measures against enemy persons and property from which neutrals are free; but while the rule as to private property on land is comparatively simple, its location constituting the test of enemy character, private property at sea is tested by other criteria to determine whether or not it is vested with enemy character. According to the Continental practice,² nationality is the test of enemy character, so that the subjects of the belligerents and their property bear enemy character, whereas the subjects of neutrals and their property do not. But under the Anglo-American rule, in which domicile is the test, regardless of nationality, as well as under prescribed exceptional circumstances, subjects of the enemy state do not necessarily bear enemy character, whereas neutrals may by their domicile or their acts be properly considered as enemies. Neither the Second Hague Conference nor the London Naval Conference of 1908 was able to reconcile these conflicting views concerning nationality or domicile as the controlling factors in determining the neutral or enemy character of individuals and their goods.³

Under the Anglo-American rule, the political character of private property at sea depends on the commercial domicile of its owner.⁴ This differs from civil domicile, inasmuch as it does not require long-continued

¹ Hall, 741; Bentwich, 27; Oppenheim, §§ 364-367. Great Britain in purchasing neutral cargoes in her ports may be regarded as availing herself of this right. A more delicate question is presented by the unlawful seizure of neutral cargoes on the high seas and their subsequent purchase when brought into port.

² Fiore, III, § 1432 *et seq.*; Calvo, IV, § 1932 *et seq.*; Bonfils, § 1343 *et seq.*

³ The recent British Aliens Restriction (Consolidation) Order, 1914, § 31, and Trading with the Enemy Proclamation, No. 2, clauses 3 and 6 modify the general rules as to enemy character. See Schuster, E. J., *Effect of war . . . on commercial transactions*, 2nd ed., London, 1914, p. 3-7. See also Page, Arthur, *War and alien enemies*, London, 1914, ch. I-IV. *Infra*, p. 00.

⁴ Bentwich, 142; Westlake, II, 140; Oppenheim, II, §§ 88, 90; Laurent (Gt. Brit.) *v. U. S.*, Feb. 8, 1853, Moore's Arb. 2671; *The Pizarro*, 2 Wheaton, 246. Japan appears to have adhered to the principle of domicile in these matters.

residence with an intention not to return, but only such a residence for the purposes of trading as makes a person's trade or business "contribute to or form part of the resources of such country, and renders it therefore reasonable that his hostile, friendly or neutral character should be determined by reference to the character of such country."¹ Such commercial domicile may differ from the actual civil domicile of the owner. For example, in Anglo-American law, his house of trade (commercial domicile) may be in neutral territory and the property at sea emanating from that house of trade escape belligerent capture, notwithstanding his civil domicile in enemy territory.² The obverse rule has equal force. So an owner may have several houses of trade, some in neutral, some in enemy territory, according to which his property may be judged. The rule as to commercial domicile is applied even to friendly subjects. It may be added that all goods on enemy vessels are presumed to be enemy goods unless the contrary is proved.

The enemy character of a ship is determined by its flag, regardless of the nationality or domicile of the owner, provided she is sailing under it legitimately according to the municipal law of the state of the flag.³ A vessel under a neutral flag, however, may acquire enemy character or at least forfeit its neutral protection by taking part in the hostilities, by rendering unneutral service, by carrying contraband in excess of the permitted proportions, by the use of fraudulent means to evade just capture, by breaking or attempting to break a lawfully established blockade, or by forcibly resisting visit and search.⁴ Individuals may also lose their neutral character by rendering unneutral service to either belligerent.⁵ The questions involved in the transfer of enemy vessels

¹ Dicey, *Conflict of laws*, 737. See also *supra*, p. 110.

² Attention may be called to the peculiar rule of American prize law, according to which a partner's residence in the enemy's country will condemn his share in a house of trade established in neutral territory. *The Antonia Johanna*, 1 Wheat. 159.

³ Oppenheim, II, § 89; Westlake, II, 147. Arts. 56 and 57, Declaration of London. A reservation might, however, be made to the effect that the municipal law conferring the right to fly the national flag must not conflict with the rules of international law as to transfer of flag in time of war. See *The Tommi* and *The Rothersand*, condemned by British prize court, Oct. 12, and Oct. 15, 1914, L. R. [1914] Probate, 251.

⁴ Westlake, II, 153; Oppenheim, II, §§ 89, 406.

⁵ See Art. 17 of Convention V of the Second Hague Conference, and Oppenheim,

and goods to a neutral flag in contemplation of or during war have found a generally accepted solution in the rules formulated by the London Naval Conference of 1908.¹ But the fact that a neutral individual furnishes supplies or makes loans to either belligerent from neutral territory does not affect his neutral character.²

§ 103. War on Land.

The effects of war upon private property on land may now be considered. It has already been observed that neutral and enemy property in hostile territory are in general subject to the same treatment. Where such property is seized or destroyed for strategic reasons directly incident to belligerent action, the private owners need not be compensated for their losses.³ This rule is based on military necessity, and the difficulty of its application, as will be seen presently, arises in determining whether a particular seizure or destruction was prompted by imperious military necessity or constituted a deliberate appropriation of private property for public use, although perhaps indirectly connected with belligerent purposes. It has been noted that under certain circumstances neutral property merely temporarily in hostile territory, such as ships, may only be seized on payment of compensation, under the belligerent right of angary.⁴

II, § 88. *The Industrie* (German) and *The Quang-nam* (French), condemned by Japanese prize courts in Russo-Japanese war; Takahashi, S., *International law applied to the Russo-Japanese war*, New York, 1908, pp. 732-738.

¹ Articles 55, 56 and 60 of the Declaration of London; Oppenheim, II, §§ 91, 92. The former conflicting rules are discussed by Westlake, II, 148 *et seq.* See the *Sophia Rickmers*, 61 St. Pap. 1091. For the opinion of the State Department rendered during the present European War concerning the transfer of merchant ships during war, see Sen. Doc. 563, 63rd Cong., 2nd sess. Translations from the works of leading authorities on the question of transfer of flag have been published in pamphlet form by the Legislative Reference Division of the Library of Congress, 1915. The *Dacia* case is now (March, 1915) pending before a French prize court. On that case, see a valuable article by Heinrich Lammasch in the *Vienna Neue Freie Presse*, January 22, 1915. A good discussion of the cases dealing with transfer of flag was undertaken by Russell T. Mount in connection with *The Tommi* and *The Rothersand* decisions of the British prize court, *supra*, in 15 *Columbia L. Rev.* (1915), 327-333.

² Art. 18 (a) of Convention V. See Dept. of State circular Aug. 15, 1914, "Neutrality—contraband—seizure of ships and cargo."

³ Bentwich, 27.

⁴ Westlake, II, 119; Oppenheim, II, §§ 364, 365. Neutral cargo, even conditional

Injuries sustained by private property as a direct result of belligerent acts—battle, siege, bombardment—or incidental thereto are not the subject of indemnification. The conduct of the belligerent, however, must conform to the laws of war, both in justification and execution. Private losses thus sustained in war are considered as due to necessity and *force majeure*. Vattel first stated what has since been accepted as the correct grounds for the non-liability of the state for these war losses—"the public finances would soon be exhausted" and "these indemnifications would be liable to a thousand abuses."¹ Yet as an act of grace, as has been remarked, a state may, after peace, consent to compensate its subjects and even domiciled aliens for their losses, thus distributing the individual loss equitably over the whole nation. As between the belligerents and enemy subjects, the treaty of peace usually constitutes a final settlement of grievances, even of those arising out of a violation of the laws of war to the injury of enemy persons and property. Neutrals, however, even with respect to property in hostile territory, retain the right to make diplomatic claims against the offending belligerent for violations of the laws of war.

While the general rule as to war claims is that no compensation is due to private individuals, on account of injuries to their persons or property, resulting from legitimate acts of war, it is not always easy to determine what is a legitimate act of war. The Hague Regulations, and instructions issued by nations to their own armies, have established a set or code of rules according to which warfare shall be conducted. An examination of numerous claims brought before municipal and international courts, will, in connection with the Hague Regulations, furnish an approximate guide to the general rules governing compensation for injuries sustained in war.

Compensation is not due for damages sustained during actual military operations, whether caused by one belligerent or the other. Thus injuries sustained during hostilities—in battle or siege,² in the track of

contraband, not destined to enemy forces, has at times been requisitioned under payment of compensation.

¹ Vattel, Bk. III, ch. 15, § 232, p. 402.

² *Wilson (U. S.) v. Spain*, Feb. 12, 1871, Moore's Arb. 3674; *Blumenkron (U. S.) v. Mexico*, July 4, 1868, *ibid.* 3669; *Riggs (U. S.) v. Mexico*, *ibid.* 3668; *Castel (U. S.) v. Venezuela*, Dec. 5, 1885, *ibid.* 3710; *Padron (Spain) v. Venezuela*, Apr. 2, 1903,

war,¹ during bombardment,² or attacks on towns,³ and in similar circumstances connected with the immediate necessities of armed conflict and subserving some proper military end⁴ are not subject to in-

Ralston, 923; Petrocelli (Italy) *v.* Venezuela, Feb. 13, 1903, *ibid.* 762; Bembelista (Netherlands) *v.* Venezuela, Feb. 28, 1903, *ibid.* 900; Rule 1 of the Mixed Claims Commission of Nicaragua, 1911, Managua, 1912. See also Amer. St. Pap., Claims, 199, Feb. 15, 1797.

¹ Vattel, Bk. III, ch. 15, § 232; Oppenheim, II, § 151; U. S. *v.* Pacific R. R., 120 U. S. 233; Puerto Cabello Ry. (Gt. Brit.) *v.* Venezuela, Feb. 13, 1903, Ralston, 458; Bembelista (Netherlands) *v.* Venezuela, *ibid.* 900; Rule 8 of Spanish Treaty Claims Commission, Final Report, May 2, 1910, pp. 4-5.

² Dutch bombardment of Antwerp 1830, 30 St. Pap. 212 *et seq.* Numerous cases of bombardment, in which compensation by the bombarding belligerent was uniformly denied, are set out in Moore's Dig. VI, §§ 1168-1170. See also Dutrieux (France) *v.* U. S., Jan. 15, 1880, Moore's Arb. 3702; Cleworth (Gt. Brit.) *v.* U. S., May 8, 1871, *ibid.* 3675; Tongue, *ibid.* 3675; Meng (France) *v.* U. S., Jan. 15, 1880, *ibid.* 3689, 3697; Perkins (Gt. Brit.) *v.* Chile, Trib. Anglo-Chileno, 1891, I, 34; Strobel's report, Moore's Arb. 4930-36, parag. 1 and 18, For Rel., 1896, 35; Amer. Elec. L. and P. Co. (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 36; Bembelista (Neth.) *v.* Venezuela, Feb. 28, 1903, *ibid.* 901; Guerrieri (Italy) *v.* Venezuela, *ibid.* 753. See, however, the Colin case, Germany *v.* France, 1888, 15 Clunet, 241. For limitations of the rule, see note 1, p. 258, and 1, p. 259, *infra*.

³ Schultz (Mex.) *v.* U. S., July 4, 1868, Moore's Arb. 2973; Wyman (U. S.) *v.* Mexico, *ibid.* 2978; Cleworth (Gt. Brit.) *v.* U. S., May 8, 1871, *ibid.* 3675; Volkmar (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 258.

⁴ All destruction and damage to enemy property for purpose of offense and defense is considered necessary and hence lawful. Oppenheim, II, § 150.

Soldiers passing over land in belligerent area and injuring crops. Shattuck (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3668; Cole (U. S.) *v.* Mexico, *ibid.* 3670; Sterling (Gt. Brit.) *v.* U. S., May 8, 1871, *ibid.* 3686.

Cutting of timber to clear away obstructions, erection of fortifications, etc., in the enemy's country. Barclay and other cases (Gt. Brit.) *v.* U. S., May 8, 1871, Hale's Rep. 50, Moore's Arb. 3678.

Seizure or destruction of property for the public welfare. Heflebower *v.* U. S., 21 Ct. Cl. 229, 237. See also Sen. Doc. 318, 57th Cong., 1st sess., pp. 19, 36, 37; *e. g.*, destruction of buildings as sanitary measure, Jaragua Iron Co. *v.* U. S., 212 U. S. 297, 306, and Hardman (Gt. Brit.) *v.* U. S., Aug. 18, 1910, 7 A. J. I. L., 897. (The arbitral court suggested that voluntary payment might be made by U. S.)

Seizure and detention of private enemy vessel after occupation of enemy port, for use of army—the doctrine of immunity of private property not followed. Herrera *v.* U. S., 222 U. S. 558, 572; Diaz *v.* U. S., 222 U. S. 574; Costa (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3724.

Destruction of property useful to the enemy for military purposes. Cox (Gt. Brit.) and Smythe (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 3678. See also Oppenheim, II, § 152; 11 Op. Atty. Gen. 378; U. S. *v.* Pacific R. R., 120 U. S. 227;

demnity, the necessary condition being that such act shall have been in accordance with the rules of war.

For example, in the matter of bombardment, definite regulations have been established which limit the principle of non-liability. If the bombardment is directed against an unfortified and undefended part of the town, or if it may be regarded as a wanton or unnecessary act, liability is incurred.¹ The legal presumption, however, is in favor of the regularity and necessity of governmental acts. The Hague Regulations and Convention IV of the Second Hague Conference have established important limitations on the justification, legitimacy, and

Magoon's Rep. 345 and 615; Cotton Claims (Gt. Brit.) *v.* U. S., Moore's Arb. 3679-82. See also Sen. Doc. 2, 42nd Cong., spec. sess.; Giles (U. S.) *v.* France, Jan. 15, 1880, Moore's Arb. 3703 (*dictum*).

The owner of property seized and destroyed to prevent its falling into the hands of the enemy is not entitled to compensation if the danger was immediate and impending, and its capture by the enemy be reasonably certain. Sparhawk *v.* Respublica, 1 Dallas, 362; 1 Op. Atty. Gen. 255; Final Report of Spanish Treaty Cl. Com. May 2, 1910, p. 12; Cotton Claims (Gt. Brit.) *v.* U. S., Moore's Arb. 3679. See H. Rep. 262, 43rd Cong., 1st sess., 44 *et seq.* Cotton was seized in the Southern states during the Civil War by the Union troops, as constituting resources of the enemy, and liability denied. Moore's Dig. VI, 895 and cases cited at p. 901. But where the danger does not appear immediate, the destruction is regarded merely as the appropriation of private property for public use for which an indemnity is due. *Infra*, note 2, page 262. The state may and often does waive its exemption from liability.

Seizure of money belonging to enemies on deposit in occupied territory in 1863 (probably unlawful to-day, except as legal contributions). New Orleans *v.* S. S. Co., 20 Wall. 394.

Other acts of military necessity. Killing of animals, opinion of Dec. 22, 1905 of Judge Advocate Gen. of the Army. Howland's Digest, 250. See also *ibid.* 251, 253, 254 and paragraph 15, Gen. Orders 100. Burning of cane by Spanish forces in Cuba, Casanova (No. 33), Spanish Tr. Cl. Com. *Ibid.*, burning of buildings when a legitimate war measure, Sen. Ex. Doc. 85, 42nd Cong., 2nd sess.; Bacigalupi (U. S.) *v.* Chile, No. 42, May 24, 1897, Rep. of Commission, 1901, 151.

Property destroyed in preparation for attack or defense. Jardel (France) *v.* U. S., Jan. 15, 1880, Moore's Arb. 3199; opinion of Judge Adv. Gen. May 1, 1906, Howland, 252; Parham *v.* Justices, 9 Georgia, 341.

¹ Barletta (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 754; Cuneo (Italy) *v.* Chile, Jan. 4, 1883, Moore's Arb. 4929, Tchernoff, 333. See also *obiter* remarks in De Lemos (Gt. Brit.) *v.* Venezuela, Ralston, 304, 314 (counsel), 319, and in Guerrieri, *ibid.* 753 and Bembelista, *ibid.* 901; Perrin *v.* U. S., 12 Wall. 315, 4 Ct. Cl. 543; Hall, 532; Samoan claims arising out of unlawful bombardment of Apia by Great Britain and United States, H. Doc. 1257, 62nd Cong., 3rd sess.

conduct of bombardment.¹ Among other limitations, the bombardment of undefended towns is prohibited; the commander must endeavor to notify his intention to bombard; hospitals, churches, schools, etc., must so far as possible be spared; and bombardment for non-payment of contributions by coast towns is prohibited. In like manner, submarine mines should be laid according to certain rules.²

The same principle which exempts the state from liability for injuries to private property caused by military necessity, extends to the incidental and consequential results of a state of war. Thus, interference with business, prohibitions of trade between enemy subjects and the limitations upon the trade of neutrals with belligerents in the matter of contraband, etc., the accidental destruction of innocent property by misdirected shots, arrests and detentions on suspicion, and similar injuries incidental to a state of war must be borne by the individuals sustaining the loss without a right to compensation.³

¹ These rules are set out in Oppenheim, II, §§ 158, 212, 213. See also Rules of the Institute of International Law, adopted at Oxford, 1913, Arts. 25 and 27, 15 R. D. I. n. s. (1913), 677.

² Failure of Turkey properly to notify neutral shipping of the laying of certain contact mines in the harbor of Smyrna is the principal ground of claim in the case of the *Nevada* (U. S.) and *Senegal* (France) *v.* Turkey. Most of the Powers have not yet agreed upon rules for the laying of submarine mines. It is reported that Austria has consented to compensate certain Italian subjects whose vessels were blown up recently by floating mines in the Adriatic. Neutral vessels injured by floating mines probably have just claims against powers which may be proved to have sowed mines in the open sea.

³ On war claims arising out of direct and indirect injuries to private property, see Lawrence's report on war claims, etc., H. Rep. 262, 43rd Cong., 1st sess., and Feraud-Giraud, *Recours à raison des dommages causés par la guerre*, Paris, 1881, 85 p. Reprinted from *La France Judiciaire*, Pamphlets, Dept. of State, v. I; Rule 2 of Nicaraguan Mixed Claims Commission, 1911. Thus the following claims were disallowed as being accidents due to a state of war: burning of buildings as a ruse to deceive the enemy (Opin. of Judge Adv.-Gen., H. Rep. 262, *supra*, p. 57); private liens destroyed by capture of public movables [*Barrett* (Gt. Brit.) *v.* U. S., May 8, 1871, Howard's Rep. 60, Moore's Arb. 2900]; firing guns across private land (*Peabody v.* U. S., 43 Ct. Cl. 5); accidental destruction of innocent property involved in the destruction of public stores and works of the enemy [Various claims (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 3677]; claims before Anglo-Chilean Tribunal, 1893, Duncan, *Recl. pres. al. Trib. Anglo-Chileno* I, 536; Hübner, *ibid.* III, 20; Club Inglés, *ibid.* III, 47; Dawson, *ibid.* III, 55; Cesarino (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 770.

Arrests and detentions on suspicion. *Hannum* (U. S.) *v.* Mexico, July 4, 1868,

Unauthorized pillage by uncontrollable soldiery has been almost uniformly considered to be a hazard of war and to relieve the government from liability.¹ A similar principle governs the wanton destruction of private property by unofficered soldiers.² The claimant has the burden of proving that the injury was committed by authority of commanding officers.³

Pillage is now formally prohibited by Article 47 of the Hague Regulations,⁴ and under a broad interpretation of Article 3 of Convention IV of the Second Hague Conference, it is not improbable that pillage by unofficered soldiers of a regular army may be held to cast responsibility upon the state. Even property of enemies found on the battlefield may no longer be indiscriminately confiscated as booty.⁵ Only military

Moore's Arb. 3243; Cramer (U. S.) v. Mexico, *ibid.* 3250; Forwood (Gt. Brit.) v. U. S., May 8, 1871, Hale's Rep. 84; Gatter (U. S.) v. Mexico, Moore's Arb. 3267; Jarman *et al.* (Gt. Brit.) v. U. S., May 8, 1871, *ibid.* 3308. Thus a state may temporarily restrain the departure of merchant vessels, to insure the secrecy of naval operations. But see Bailey (*The Labuan*), Gt. Brit. v. U. S., May 8, 1871, Hale's Rep. 171, Moore's Arb. 3791. Where the military detention is unnecessarily long or harsh, awards have been made. Berron (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3960; Story (U. S.) v. Spain, Feb. 12, 1871, *ibid.* 3269; Bigland (Gt. Brit.) v. U. S., May 8, 1871, Hale's Rep. 161.

Interference with business gives no right to compensation. Grant (Gt. Brit.) v. U. S., May 8, 1871, Hale's Rep. 162; Kerford and Jenkins (Gt. Brit.) v. U. S., Feb. 8, 1853, Moore's Arb. 3788; Money (Gt. Brit.) v. U. S., May 8, 1871, Hale's Rep. 168; Heny (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 14, 25; Dix (U. S.) v. Venezuela, *ibid.* 7; Genovese (U. S.) v. Venezuela, *ibid.* 174; Martini (Italy) v. Venezuela, Feb. 13, 1903, *ibid.* 819. Workmen of claimants compelled to serve in national guard. Siempre Viva (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3784; Cole (U. S.) v. Mexico, *ibid.* 3785, and similar awards there cited. Government may order suspension of traffic on railroad in war area [Great Venezuelan R. R. (Germany) v. Venezuela, Feb. 13, 1903, Ralston, 640] and prohibit traffic of certain residents with towns in insurrection [Longstroth (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3784].

¹ Antrey (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3672; Dresch (U. S.) v. Mexico, *ibid.* 3669; Weil, *ibid.* 3671; Schlinger, *ibid.* 3671; Buentello (Mexico) v. U. S., *ibid.* 3670; Cole (U. S.) v. Mexico, *ibid.* 3670; Claims of Great Britain v. Chile, Sept. 26, 1893, La Fontaine, 455. Sen. Rep. 544, 55th Cong., 2nd sess., 6.

² Rule 3 of Nicaraguan Mixed Claims Com. 1911; Barclay (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3678; burning of Columbia (Gt. Brit.) v. U. S., *ibid.* 3675.

³ Weil (U. S.) v. Mexico, Moore's Arb. 3671; Michel, *ibid.* 3670.

⁴ Oppenheim, II, §§ 143, 213. See also Art. 7 of Convention IX of Second Hague Conference.

⁵ See Art. 14 of Hague Regulations and Oppenheim, II, § 181.

papers, arms, horses, carts, etc., may be appropriated as booty, although experience has shown that it is difficult to hold soldiers in check and carry out this regulation to the letter.

While the belligerent necessity for a particular destruction of private property is usually within the discretion of the commanding officer, international commissions may pass upon the legitimacy of war measures in a given case.¹ Thus awards have been made on numerous occasions for wanton and manifestly unnecessary acts of destruction and pillage by the military forces of the government.² The destruction of private property in war where no military end is served is illegitimate. This rule gained universal recognition during the nineteenth century, and it is now expressly provided by Article 23 (g) of the Hague Regulations that "to destroy . . . enemy's property, unless such destruction . . . be imperatively demanded by the necessities of war, is prohibited."

One of the most important results of this codification of the rules of war has been the enlargement of the sphere of immunity of private property on land from the injurious consequences of the war. Vattel, as already observed, was the first to draw a clear distinction between

¹ Rule 6 of Spanish Treaty Claims Commission. In Rules 7 and 8 the Commission prescribed definite limitations to concentration and devastation as legitimate war measures. Final Rep., p. 4. Award of the Commission in *Tuinucu v. U. S.*, No. 240.

The opinion of the military authorities as to the necessity of a destruction is not ordinarily justiciable by the regular courts. *Ex parte Marais* (1902), A. C. 109. See also *Wentworth v. U. S.*, 5 Ct. Cl. 309.

² Usually with respect to neutral's property. Quotations from publicists and state papers in Moore's Dig. VI, § 1037; Chourreau (France) *v. U. S.*, Jan. 15, 1880, Moore's Arb. 3705; Du Bois (U. S.) *v. Chile*, Aug. 7, 1892, *ibid.* 3712; Moss (U. S.) *v. Chile*, May 24, 1897 (extending 1892 commission) Report, 1901, No. 25; Rule 5 of Span. Tr. Cl. Com.; S. B. Crandall in 4 A. J. I. L. 820; Award of King Oscar on Samoan claims of Germany against Great Britain and United States, Convention Nov. 7, 1899, La Fontaine, 613, for unwarranted military action; Strobel's Report, item V on British claims against Chile, For. Rel., 1896, 35 *et seq.*, Moore's Arb. 4930; Shrigley (U. S.) *v. Chile*, Aug. 7, 1892, Moore's Arb. 3711-12; Peruvian Indemnity, Mar. 17, 1841, Moore's Arb. 4591; Willet (U. S.) *v. Venezuela*, Dec. 5, 1885, *ibid.* 3743; Brooks (U. S.) *v. Mexico*, July 4, 1868, *ibid.* 3672; Johnston, *ibid.* 3673 (defendant government held to have burden of proving damage necessary); Jeannotat, *ibid.* 3673; H. Rep. 386, 22nd Cong., 1st sess., 14; *Indus* (U. S.) *v. Mexico*, Moore's Arb. 3718 (violation of rules of war by selling captured vessel without determination of prize courts). For extracts dealing with liability for violations of rules of civilized warfare, see Wharton's Digest, II, § 225. See Rule 18 of the Rules of the Institute of International Law on Naval Warfare adopted at Oxford, 1913.

the injuries to property due to imperious and immediate military necessity, for which compensation is not generally due, and the more deliberate use of or injury to private property for some public belligerent purpose, analogous to eminent domain, for which the state owes compensation to the individual.¹ It has not always been easy to draw the line between imperious unavoidable necessity and a deliberate act of use, occupation or destruction involving an element of choice. Yet in a general way, international commissions have endeavored to maintain the distinction by making awards for various kinds and degrees of appropriation of private property for public belligerent purposes, and municipal legislation and courts have also recognized the distinction.

§ 104. Appropriation of Private Property.

A long line of decisions has established the principle that the appropriation of private property for military purposes involves the responsibility of the state.² That such a use justifies the taking is uniformly

¹ Vattel, Bk. III, ch. 15, § 232.

² *Mason v. U. S.*, 14 Ct. Cl. 59; *Waters v. U. S.*, 4 Ct. Cl. 299; *Kimball v. U. S.*, 5 *ibid.* 252; *Heflebower v. U. S.*, 21 *ibid.* 228, 237; *Grant v. U. S.*, 1 *ibid.* 41, 43-44 (a leading case); Sen. Rep. 544, 55th Cong., 2nd sess., 6. The Court of Claims has proceeded on the theory of implied contract and intention to pay. The U. S. Supreme Court leans more directly towards the theory of eminent domain. *Mitchell v. Harmony*, 13 Howard, 113, 134; *U. S. v. Russell*, 13 Wall. 36.

Saulnier (U. S.) v. Mexico, March 3, 1849, Moore's Arb. 3715; *Hollenbeck (U. S.) v. Costa Rica*, July 2, 1860, *ibid.* 3717 (building burned down in operations for defending town); *Baker (U. S.) v. Mexico*, July 4, 1868, *ibid.* 3668 (cattle and horses taken by Mexican army); *Marks (U. S.) v. Mexico*, *ibid.* 3722, Hall, *ibid.* 3722; *Elliot*, *ibid.* 3720; *Bartlett*, *ibid.* 3721; *Cole*, *ibid.* 3721; *The Macedonian (U. S.) v. Chile*, Nov. 10, 1858, *ibid.* 1465; cases cited in Hale's Rep. 44, Moore's Arb. 3688, Commission of May 8, 1871, and *Henderson (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3728; *Wilkinson*, *ibid.* 3736; *Braithwaite*, *ibid.* 3737; *Adlam*, *ibid.* 2552. *Means (France) v. U. S.*, Jan. 15, 1880, Moore's Arb. 3706 (property destroyed in friendly territory to give better range to guns); *Labrat (France) v. U. S.*, *ibid.* 3706; *Shrigley (U. S.) v. Chile*, Aug. 7, 1892, *ibid.* 3712; *Dix (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 7; *Kunhardt (U. S.) v. Venezuela*, *ibid.* 63, 69; Spanish Treaty Cl. Com. Final Rep., May 2, 1910, pp. 15-17 (allowances for property used by Spanish authorities, regardless of the purpose); *Reyes*, No. 153; *Del Valle*, No. 222, No. 278; *Yznaga*, No. 279; *Constancia*, No. 196. Principles of allowance in Mixed Claims Commission in China, following revolution of 1911.

See Act of April 9, 1816, § 5 (3 Stat. L. 261); Act of July 4, 1864 (13 Stat. L. 381). The Act of Mar. 3, 1871 (16 Stat. L. 524) establishing Southern Claims Com-

admitted. The rules relating to requisitions and contributions adopted at recent Hague Conferences, which will be examined presently, endeavor to give precision to the practice of appropriation of private property in belligerent territory. Under the present Hague Regulations private enemy real property cannot be appropriated. Private movables which may serve as war material may be appropriated, but they must be restored at the conclusion of peace and indemnities paid (Article 53). They must be acknowledged by receipt, and as between the belligerents, the treaty of peace determines upon whom shall fall the duty of making compensation. Personal property other than war material may not as a rule be appropriated. Article 46 provides that "private property may not be confiscated." But under exceptional circumstances of necessity, where there is no time for ordinary requisitions of food, etc., or where the property has been abandoned by its owner, the belligerent may properly seize it.¹ It has already been noted that private enemy property found in belligerent territory at the outbreak of war or brought into it during the war may not be confiscated.

When the invading belligerent becomes a military occupant he is under still greater restrictions with respect to private property, which is subject to appropriation only under the rules governing requisitions and contributions.²

mission provided that "stores and supplies furnished by or taken from loyal citizens in the insurrectionary states should be paid for." Conventions of July 4, 1868 with Mexico, May 8, 1871 with Great Britain, and Jan. 15, 1880 with France permitted of similar payments to subjects of those countries. But where the person or property was tainted with unneutral character no recovery was allowed. Davidson, No. 66, Hale's Rep. 43. See House Doc. 460, 56th Cong., 1st sess., 9; order of Sec'y of War, June 22, 1862, Moore's Arb. 1036; proclamation of the President, July 13, 1898; Sen. Doc. 318, 57th Cong., 1st sess., 19. See Abandoned or Captured Property Act, March 12, 1863 (12 Stat. L. 820), Moore's Dig. VI, 901 and Moore's Arb. 3745.

See also Lawrence's Rep. *supra*; Whiting's war powers under the Constitution, p. 340; article by Wm. King, War claims for property, 20 Amer. Law Reg. (1881), 227, 233. See also a few pertinent extracts in Moore's Dig. VI, § 1034.

¹ Oppenheim, II, 170 *et seq.* See the Bulgarian decree of Feb. 25, 1913 to the effect that private real property abandoned by its Mussulman owners would become the property of Bulgaria. This is contrary to Art. 46. 40 Clunet (1913), 1043. On the principles followed by Greece during the occupation of Salonica see Maccas in 20 R. G. D. I. P. (1913), 230 *et seq.*

² The military occupant's relation to public property is discussed by Oppenheim, II, § 134 *et seq.*

The use and occupation of buildings or real property in more than a temporary way and when not impelled by overruling military necessity has been held to involve the responsibility of the state,¹ and especially where the territory had come into the permanent possession of the occupying belligerent.² Loyal citizens in the Southern states during the Civil War were given the right, under the Abandoned or Captured Property Acts, to sue for the rents of their abandoned property covered into the Treasury. It has been held lawful to quarter troops on and occupy the property of active enemy subjects.³ Under imperious military necessity, a belligerent may without indemnification use both public and private buildings and convert them into hospitals, barracks, stables and fortifications, as occasion requires.⁴

The government has been held liable on numerous occasions for such a use and occupation of private neutral property as to expose it specially to the fire of and destruction by the enemy.⁵ This rule extends only to property occupied in advance of actual fighting, rather than such as is occupied during an attack or retreat. It is the seizure of private property for the public use and its loss and destruction while so employed, that warrants an indemnity to the owner.

It has been noted that when military necessity in the presence of the enemy demands the immediate destruction of property to prevent its falling into the enemy's hands no liability is incurred by the belligerent.

¹ H. Ex. Doc. 124, 43rd Cong., 1st sess.; *U. S. v. Speed*, 8 Wall. 83; *Armendariz (Mexico) v. U. S.*, July 4, 1868, Moore's Arb. 3722; *Willet (U. S.) v. Venezuela*, Dec. 5, 1885, *ibid.* 3743.

² *Crutchett (Gt. Brit.) v. U. S.*, May 8, 1871, Hale's Rep. 46, Moore's Arb. 3734. Other similar cases cited in Moore's Arb. 3735.

³ German practice in Franco-Prussian War, Bentwich, 33. See also *Gonzales (Mexico) v. U. S.*, July 4, 1868, Moore's Arb. 2824; *Opin. of Judge Adv.-Gen., Howland*, 250 and 253. (In Civil War, residents in insurrectionary states had to prove their loyalty; in Philippines, government had to prove native's disloyalty.)

⁴ *Oppenheim*, II, §§ 136, 140.

⁵ *Putegnats Heirs (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3718, 3720,—other cases cited p. 3720; *Bowen (U. S.) v. Mexico*, *ibid.* 3731; *Willet (U. S.) v. Venezuela*, Dec. 5, 1885, *ibid.* 3743; *Amer. Elec. and Mfg. Co. (U. S.) v. Venezuela*, Feb. 13, 1903, *Ralston*, 35; *Petrocelli (Italy) v. Venezuela*, Feb. 13, 1903, *ibid.* 762; *Matamoras Fire Claims (Gt. Brit.) v. Mexico*, 52 St. Pap. 281; H. Rep. 386, 22nd Cong., 1st sess., 3, 9, 12; 3 Stat. L. 263, § 9; 3 Stat. L. 397, § 1. See opinion of Judge Adv.-Gen. Sept. 4, 1902, *contra*, *Howland*, 253.

The line between overruling necessity in the face of immediate danger and deliberate destruction for the ultimate end of preventing its capture by the enemy is often exceedingly vague, so that courts and commissions in numerous cases have considered such destruction under the latter head as an appropriation of private property for the public use and have awarded indemnities to the owner.¹ To justify its destruction without title to indemnity, the danger of its capture by the enemy must be immediate and impending.

The cutting of privately-owned cables connecting occupied territory with neutral territory, when a military necessity, was considered, prior to the First Hague Conference, as not to afford a legal ground for a claim to indemnity.² The view of the United States was that such cables were exposed to the risks of war, as was other neutral property, in which view it was confirmed by Article XV of the Convention of March 14, 1884 for the protection of submarine cables, which left the belligerents freedom of action.³ But in considering the claims for neutral cables cut by United States forces in Cuba and the Philippines during the Spanish-American War, the President recommended their payment by Congress as a matter of equity, and several claims were accordingly paid.⁴ Article 54 of the Hague Regulations provides that cables connecting occupied enemy territory with neutral territory shall not be seized or destroyed, except in case of absolute necessity, in which event the cables must be restored at the conclusion of peace and indemnities paid.⁵

Embargo, or the detention of private property, meant originally only the detention of vessels in port. The term has been used in several

¹ *Grant v. U. S.*, 1 Ct. Cl. 41; *Wiggins v. U. S.*, 3 Ct. Cl. 412; *Mitchell v. Harmony*, 13 Howard, 115; *Turner (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3684; *Anderson and Thompson (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2479; *Barrington (U. S.) v. Mexico*, July 4, 1868, *ibid.* 3674; *Bertrand (France) v. U. S.*, Jan. 15, 1880, *ibid.* 3705; *The Phare (France) v. Nicaragua*, Award of French court of cassation, *ibid.* 4870, 4873.

² Atty. Gen. Griggs, 22 Op. Atty. Gen. 654.

³ See also Art. 5 of the U. S. Naval War Code.

⁴ See quotations and citations in Moore's Dig. VI, 924-926 and H. Rep. 8, 57th Cong., 1st sess., pp. 1, 2, 5, 8 and S. Doc. 16, 58th Cong., 2nd sess., pp. 6, 10, 22, 23.

⁵ Oppenheim, II, § 214. See Rule 54 of the Rules of the Institute of International Law on naval warfare adopted at Oxford, 1913.

senses: (1) as a form of reprisal by which enemy merchantmen in belligerent ports were formerly confiscated; (2) the detention of vessels to prevent the spread of important military information; and (3) the right, better known as angary, to use and if necessary, destroy neutral vessels temporarily in a belligerent port. The United States in its treaty of 1795 with Spain stipulated that "Citizens . . . shall not be liable to any embargo or detention . . . for any military expedition, or other public or private purpose whatever."¹ This inhibition of embargo has been held to extend to property on land as well as to vessels and their cargoes.² In former times, it was a common practice for belligerents to lay an embargo on enemy merchantmen in their ports at the outbreak of war. Article 1 of Convention VI of the Second Hague Conference provides that it is *desirable* that an enemy merchantman in port be allowed freely to depart, and it is probable that only for grave reasons will a belligerent now detain an enemy merchantman. Such vessels as are detained may not be confiscated, but must either be returned, without indemnity, at the end of the war or may be requisitioned on payment of compensation (Article 2). The same rule applies to vessels which left their last port before the outbreak of war, and while ignorant of the war, are met at sea by a belligerent war vessel (Article 3).³ As in modern days vessels rarely remain ignorant of war for any length of time, this apparent exemption from capture is likely to be illusory.

The right of belligerents in case of necessity, for belligerent purposes,

¹ A somewhat similar clause is contained in Art. 7 of the treaty of 1828 with Brazil.

² *Macias (U. S.) v. Spain*, Feb. 12, 1871, Moore's Arb. 3775; Thompson, *ibid.* 3779; Rivas, *ibid.* 3780. The cases of embargo under the decree of 1869 in Cuba are discussed in Moore's Arb. 3754 *et seq.* Indemnities for similar embargoes were provided for in the unratified Strobel-Figuera agreement of May 3, 1887. For the embargoes under decree of 1896 and the embargo claims arising out of the 1895-1898 Cuban insurrection, see Moore's Dig. VI, 908-914 and cases of *Hernsheim*, No. 297, *Bauriedel*, No. 239, and *Gato*, No. 171, before the Spanish Treaty Cl. Com. See also Rule 10 of that Commission.

³ Oppenheim, II, §§ 40, 102a. See full discussion in Scott, *Hague Conferences*, 556-568. The United States is not a signatory of this convention. Contrary to the general practice, Turkey, which has not ratified Convention VI, seized some Italian vessels in Turkish ports at the outbreak of the Turko-Italian war of 1911. 15 R. D. I. n. s. (1913), 577. On days of grace for departure of enemy vessels in port at outbreak of war, see *supra*, p. 62.

to detain, use, or even destroy neutral property not vested with enemy character is known as the right of angary, a modern development of the former *jus angariæ*.¹ The payment of indemnity is a necessary condition of such use of neutral property. The application of this rule has generally arisen through the detention, use or destruction of neutral vessels temporarily in the ports of a belligerent.²

§ 105. Requisitions and Contributions.

Requisitions and contributions are a modern survival of the old usage of spoliation and confiscation. They are levies of supplies and money made by a belligerent on the theory that he may make his enemy pay for the continuation of the war. They are imposed usually in territory under military occupation, although requisitions may also be levied by an army on the march. By municipal law, states often levy requisitions upon their own subjects, but this is generally conditioned upon payment of proper indemnities. While the property of neutral aliens useful for military purposes, such as horses or automobiles, is subject to requisition, the national governments of these aliens may properly insist upon payment in cash, or else acknowledgment by receipt with a view to future payment. It is also proper to insist that there be no discriminatory treatment of the subjects of any one foreign nation.

When exercised by a belligerent upon enemy territory, the unrestricted right of requisitions and contributions is too apt to become an indirect means of spoliation, and the Regulations adopted at the Hague Conferences are intended, first, to limit the right to immediate military necessities, and secondly, to prevent the burden falling upon the individual alone, but rather to distribute it equally over the population as a

¹ Oppenheim, II, § 364; Westlake, II, 119; Hall, 741; U. S. Naval War Code, Art. 6.

² *Labuan* (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3791; *Ophir* (U. S.) v. Mexico, April 11, 1839, *ibid.* 3045; *Brig Splendid* (U. S.) v. Mexico, *ibid.* 3714; *Kidder* (U. S.) v. Mexico, March 3, 1849, Opin. 519 (not in Moore); *Orr and Laubenheimer* (U. S.) v. Nicaragua, March 22, 1900, For. Rel., 1900, 824, 829; *The Moshona and the Beatrice* (U. S.) v. Great Britain, For. Rel., 1900, 529-618; *The Tabasqueno* v. U. S., For. Rel., 1907, 614 (neutral cargo is in the same position as the neutral vessel); *U. S. v. Russell*, 13 Wall. 623 (implied contract in municipal law). See the celebrated case of the sinking by German troops of British vessels in the Seine, 1870, in which indemnity was paid. 61 St. Pap. 575, 600, 611 and Moore's Dig. VI, 904.

whole. Article 52 of the Hague Regulations provides that "neither requisitions in kind, nor services, can be demanded from localities or inhabitants except for the needs of the army of occupation. They must be in proportion to the resources of the country. . . . Supplies in kind shall as far as possible be paid for on the spot; if not, the fact that they have been taken shall be established by receipts."¹ In addition, only the local commander, and not individual officers or soldiers, may order requisitions. Quartering is a special kind of requisition, which comes under the general rule.

The great weakness of these Regulations lies in the fact that no definite limitation is imposed upon a military commander, and the owner of private property is only in a little less precarious condition than heretofore. There is no guide to what may be considered "the needs of the army of occupation," and because of the fact that payment need be made only "as far as possible," the right of indemnity is problematical. It is true that receipts evidence the exaction of goods, but no promise to pay is implied, either by the occupant or the occupied country. The treaty of peace may settle the question of payment, but if left open, the owner is dependent on the bounty of his government, unless as in France the law provides that the individual shall have an action against the commune for reimbursement of requisitions.²

Contributions are a further menace to private property. They consist in the levy of money upon the inhabitants of occupied territory, in excess of the produce of regular taxes. The Hague Regulations (Articles 49-51) have endeavored to prevent extortionate demands amounting to spoliation, by systematizing and limiting the right to levy contributions. They may be levied for the needs of the army only or of the administration of the occupied territory. This is to operate as a check upon pillage. Again, the contributions must be levied on the written

¹ Bentwich, 34; Albrecht, *Requisitionen von neutralem Privateigentum*, Breslau, 1912, p. 1 *et seq.*; Oppenheim, II, § 146 *et seq.*, Westlake, II, 96 *et seq.* C. N. Gregory in an article in 15 *Columbia L. Rev.* (1915), 207-227 presents a useful resumé of the views of leading publicists on the subject of contributions and requisitions.

² Dalloz, *Supplement XV*, 1895, p. 459; 21 *Journ. du Dr. Administratif* (1873), 171-187; 37 *Clunet* (1910), 255, case in Chile. A French law of July, 1909, makes automobiles the subject of requisition, regardless of the nationality of the owners. See proceedings against John Morris, a British subject, noted in Jan. 1914, *Journ. of the Soc. of Comp. Leg.*, p. 283.

order and on the responsibility of a commander-in-chief, and not merely of a local commander. They must not be imposed indiscriminately, but must follow the assessment rolls, and receipts must be given.¹ These limitations upon the levy of contributions do not prevent a belligerent from imposing fines upon inhabitants who commit acts of hostility against him, or disobey his commands. Under such circumstances, private property may even be confiscated. This is forfeiture, rather than appropriation. The belligerent may no longer properly, however, "inflict a general penalty, pecuniary or otherwise, on the population on account of violent acts for which it cannot be regarded as collectively responsible."²

A belligerent government often levies forced loans upon its own subjects immediately before or during the war, and resident neutrals are equally liable to such payment. The United States in 1868 in a case in Italy admitted that its citizens resident abroad are subject to these exactions, on the condition that they be levied on all the inhabitants impartially and in just proportions.³ On the other hand, the United States has protested against the usage on several occasions, or at least insisted upon repayment.⁴ Well-ordered countries do not levy forced loans. Mexico has resorted to the practice on several occasions, and numerous claims of this kind have come before arbitral commissions between the United States and Mexico. The Commissions of 1839, 1849 (domestic), and 1868 (until Thornton became umpire), considered forced loans illegal, and made awards in favor of the claimants.⁵ When Thornton

¹ Bentwich, 36; Oppenheim, II, § 148.

² Hague Regulations, Art. 50; Bentwich, 37.

³ Moore's Dig. VI, 916. Although British subjects were protected by treaty against forced loans, it seems Mr. Seward would have regarded their exemption as a discrimination against U. S. citizens who enjoyed no such treaty exemption. See also *McManus (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3411, 3415 and *Rose (U. S.) v. Mexico*, *ibid.* 3417, 3421.

⁴ Mr. Bayard, Sec'y of State, to Mr. Buck, Min. to Peru, May 20, 1886, Moore's Dig. VI, 918; Mr. Fish, Sec'y of State, to Mr. Foster, Min. to Mexico, Aug. 15, 1873, *ibid.* 917.

⁵ *Ducoin (U. S.) v. Mexico*, April 11, 1839, Moore's Arb. 3409; *Homan (U. S.) v. Mexico*, March 3, 1849, *ibid.* 3409; *Robinson (U. S.) v. Mexico*, *ibid.* 3410, and other cases cited on p. 3410; *Moike (U. S.) v. Mexico*, July 4, 1868, *ibid.* 3411 (opinion by Wadsworth, Amer. commissioner). See also *Beckman (Germany) v. Venezuela*, Feb. 13, 1903, *Ralston*, 599 and *De Caro (Italy) v. Venezuela*, Feb. 13, 1903, *ibid.* 818.

succeeded Dr. Lieber as umpire of the 1868 commission, he held forced loans to be legal, and provided they are equally distributed amongst all the inhabitants, without discrimination in the exaction or the reimbursement between native and foreigner, even if neither are repaid, there is no ground of complaint.¹ Transient aliens are not subject to forced loans.² Umpire Thornton also expressed the opinion that treaties exempting the citizens of certain countries from forced loans merely prevented a discriminatory exaction against those citizens, but that they are subject to such loans equally with other inhabitants.³ The United States, in numerous treaties with foreign countries, has stipulated for the exemption of its citizens from forced loans.

§ 106. War at Sea.

With respect to war at sea, only a few rules have thus far been formulated at The Hague.⁴ At the London Naval Conference numerous rules were adopted, which, while reasonable and regarded as a restatement of established law, have, as yet, failed of general ratification. As contrasted with land warfare, one of the most important phenomena of maritime war is the difference between private enemy and neutral property. Notwithstanding the efforts of the United States, enemy merchantmen and enemy cargo in such vessels are still subject to seizure.⁵ Neutral property, however, since the Declaration of Paris, enjoys a considerable range of immunity from seizure, which extends, in the case of vessels, to enemy goods on board, with the exception of contraband, and in the case of goods, exempts them from seizure, if not contraband, even under the enemy flag. Convention VIII of the Second Hague Conference provides for certain methods of legitimate attack upon and capture of enemy

¹ *McManus (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3411, 3415; *Rose (U. S.) v. Mexico*, *ibid.* 3417, 3421; *Cole*, *ibid.* 3422 and cases cited p. 3423. But he awarded indemnities when the exaction of the loan was enforced by arrest and imprisonment, as he believed there must have been means of enforcing payment by judicial proceedings.

² *Weil (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3424, Thornton, umpire.

³ Moore's Arb. 3416.

⁴ The Institute of International Law, at its Oxford meeting in 1913, adopted a code of naval warfare. 15 R. D. I. n. s. (1913), 677 *et seq.*

⁵ The history of private property at sea is discussed by Oppenheim, II, § 176 and by Bentwich, ch. VII. See also Loreburn, R., *Capture at sea*, London, 1913.

merchantmen. Any violation of these rules on the part of ratifying Powers would involve the responsibility of the state, and in the case of neutral property injured thereby, would give rise to international reclamation. Certain kinds of enemy vessels, however, are immune from seizure, *e. g.*, those engaged in scientific discovery, coast fishing boats and small vessels engaged in local trade.¹ Merchantmen bound for enemy ports in ignorance of the outbreak of the war may not be confiscated if still ignorant at the time of capture, but they may be detained on condition that they be restored at the end of the war or indemnity paid if used or destroyed. There is no general rule as to the exemption of mail-boats, this matter being usually agreed upon in special treaties, but enemy mail bags are immune from seizure.²

Although neutral property enjoys a considerable measure of immunity from seizure it is still in many respects subject to molestation in war, by virtue of the belligerent's right of self-preservation. The belligerent's right of interference with neutral commerce falls under the three heads of contraband, blockade and unneutral service. Under the first, he may under certain conditions, confiscate neutral property which may aid his enemy or interfere with his military operations;³ under the second, he may forbid neutrals to have any communication with such part of his enemy's maritime frontier as he can effectually watch, confiscation being the penalty for an attempt to run a legitimately estab-

¹ It seems that Turkey did not observe these rules in her recent war with Italy, 15 R. D. I. N. S. (1913), 577-578. Turkey has not ratified the Hague Convention. On the exemption of coast fishing vessels and the liability to capture of deep-sea fishing vessels see the recent decision of the British prize court in *The Berlin*, L. R. [1914] Probate, 265, Oct. 29, 1914 and a discussion on the *Paquete Habana* and other prize cases by Russell T. Mount in 15 Columbia L. Rev. (1915), 334-336.

² Oppenheim, II, § 186. It is obviously beyond the scope of this discussion to enter into the details of the conduct of maritime warfare and its related questions, including neutrality. These matters are fully discussed in the more important works on international law and in special treatises.

³ The intricate rules governing contraband carriage, which have been much simplified by the Declaration of London, will be found discussed in Oppenheim, II, § 391 and in the special works cited by him at the head of Chapter IV. In a few early treaties, it was provided that contraband belonging to subjects of the other contracting party, could not be confiscated, but merely detained or used in consideration of payment. See treaties between U. S. and Prussia, July 11, 1799 and May 1, 1828, Malloy, Treaties, II, 1490, 1499.

lished blockade;¹ and under the third, he may forbid neutral vessels from rendering certain services which may directly assist his enemy.² To give effect to these rights, the belligerent's cruisers may visit and search, and detain any suspected neutral vessel, and his sanction is the power to confiscate the offending vessel or cargo after it has been condemned in the belligerent's prize court.³ By resistance to the belligerent's right of visit and search, the neutral constructively assumes enemy character and becomes subject to capture and confiscation. If a suspected vessel is found innocent by a prize court or administrative body, she is only entitled to compensation if there was no probable cause for her detention.⁴ The abuse by belligerents of the neutral rights of the United States constitutes an important chapter in the diplomatic history of the United States, and vast sums have been collected, particularly from Great Britain and France, for spoliations upon neutral American commerce.⁵

The belligerent may, subject to the limitations established by uniformly recognized practice, fix upon the articles which he will regard as contraband, and compel neutrals to respect his decision, under penalty of confiscation. There are certain international rules which have been adopted and have received general sanction at recent Conferences, particularly the London Naval Conference of 1908, and certain well-established principles of prize law, which belligerents can disregard only at the risk of international reclamation. For example, the seizure of conditional contraband such as foodstuffs, without evidence of its destination for hostile military use, under a presumption that its consignment to enemy commercial ports is proof of its intended military use, is an abuse of belligerent and a violation of neutral rights and has afforded ground for diplomatic claims.⁶ Vessels violating the belligerent's

¹ Oppenheim, II, §§ 368-390.

² *Ibid.* II, §§ 407-413.

³ Bentwich, 108.

⁴ *Ibid.*, 109 and cases cited. See also the *Eastry* (Gt. Brit.) *v.* Japan, Takahashi, S., *International law applied to the Russo-Japanese war*, New York, 1908, pp. 358, 739. The discussions before the London Naval Conference on the question of indemnities to released ships (Basis 12) will be found in Cd. 4555 (Misc. No. 5), 1909, 187-188 and Renault's report on the matter, *ibid.* 338-339.

⁵ See Moore's Dig. VI, § 1049.

⁶ See, *e. g.*, *Arabia* (U. S.) *v.* Russia, For. Rel., 1904 and 1905, and *Antiope* (U. S.) *v.*

contraband regulations or his interpretation, on facts or law, of his right of capture, are tried in his municipal prize courts; but as the decisions of these courts are not necessarily binding on neutral nations, the latter have often successfully brought international claims against erroneous condemnations by municipal prize courts.¹

Japan, Russian and Japanese Prize Cases, II, 389-402. Germany has been required to indemnify the U. S. on behalf of the owners of the American ship *William P. Frye*, sunk in mid-ocean by the converted cruiser *Prinz Eitel Friedrich* on the assumption that her cargo of wheat destined to Queenstown was contraband, and justified capture of the vessel and cargo, and under the particular circumstances of the captor, the sinking of the vessel. Germany's contention that her liability was based upon the treaties of 1799 and 1828 between the United States and Prussia (Malloy, II, 1490 and 1499), appears to have been accepted by this government (New York Times, May 6), although no claim on this ground was originally advanced. Belligerents have frequently violated the rule that a presumption of innocent use attaches to conditional contraband not consigned to a military base or destination and that the burden lies upon the captor to prove, and not upon the cargo owner to disprove, its intended hostile military use. Legal presumptions and the burden of proof play an exceedingly important part in claims arising out of captures on account of contraband. The designation of provisions as absolute contraband evoked earnest protests from neutrals during the Russo-Japanese war. Bon, Louis, *La guerre Russo-Japonaise et la neutralité*, Montpelier, 1909, p. 227.

¹ See *infra*, p. 275 and the recent award of the Hague court, May 6, 1913, in the case of the *Carthage* (France) *v.* Italy, Jan. 26 and Mar. 6, 1912, 7 A. J. I. L. 623, in which Italy was held liable in damages for the capture and detention of a neutral vessel and the confiscation of an aeroplane on board, the seizure having been made without sufficient grounds to assert the hostile destination of the aeroplane. Hostile destination being a condition of contraband, the most important difference between absolute and conditional contraband lies in the presumptions of hostile use arising out of its consignment. Thus, absolute contraband consigned to enemy territory is presumed to be destined for hostile military use, and the doctrine of continuous voyage applies. Conditional contraband, on the other hand, is presumed to have a non-hostile destination unless consigned to the military arm of the government, directly or indirectly, and the captor has the burden of overcoming the presumption. Oppenheim, II, § 395; Hirschmann, Otto, *Das internationale Prisenrecht*, München, 1912, § 38. The generally accepted rule now is that the doctrine of continuous voyage does not apply to conditional contraband. Again, goods found in an enemy's ship are presumed to be enemy's property. The neutral must prove its neutral ownership, the evidence required depending upon the nature of the case. The matter of ownership is often a determining issue in prize cases. In the case of the *Manouba* (France) *v.* Italy, Jan. 26 and Mar. 6, 1912, Hague Court of Arbitration, indemnity was awarded for the capture and detention of a vessel having on board certain suspected enemy soldiers, the ground of award being that no demand for their surrender had been made; see Robert Ruzé in 46 R. D. I. (1914), 101-136. See also cases reported in Moore's Arb. 3843-3885.

Since the Declaration of Paris of 1856 a blockade to be binding must be effective, which means, according to the Anglo-American practice, that the force maintaining the blockade must be sufficient to make it dangerous for neutrals to enter. Thus, the interference with neutral commerce by the establishment of a paper blockade of ports in the hands of insurgents has in numerous cases been held to involve the responsibility of the state.¹ Similarly, erroneous notice of the blockade

The impartial student of international law must have greeted with astonishment Great Britain's recent radical departure from the accepted principles of maritime law in war, a course grievously subversive of the rights of neutrals. It seems inconceivable that Great Britain could have expected neutral nations to consent to the practical abrogation of the distinction between absolute and conditional contraband in the matter of hostile and innocent destination, and of the presumptions thereto attaching, as well as the remarkable enlargement of the contraband lists. The Order in Council of October 29, 1914 provides that notwithstanding the provisions of Art. 35 of the Declaration of London, which renders conditional contraband liable to capture only if destined "for the use of the armed forces or of a government department of the enemy state," conditional contraband "shall be liable to capture on board a vessel bound for a neutral port if the goods are consigned 'to order,' or if the ship's papers do not show who is the consignee of the goods or if they show a consignee of the goods in territory belonging to or occupied by the enemy." (According to press reports, Germany now seems to have proclaimed a somewhat similar rule.) Moreover, "the owner of the goods" must "prove that their destination was innocent." Not only has the immunity of conditional contraband from the application of the doctrine of continuous voyages been practically set aside, but conditional contraband bound for *any* neutral port, if consigned "to order" is confiscable. Moreover, the established rule that the captor has the burden of proving the hostile destination of conditional contraband, a rule which Great Britain earnestly supported during and after the Russo-Japanese War, has been completely reversed by the Order. It is interesting to compare Sir Edward Grey's contention in the *Oldhamia* case against Russia, Jan. 4 and Aug. 22, 1910, Misc. No. 1, 1912, Cd. 6011, pp. 15-17. Great Britain has left very little on the non-contraband list. In addition, if a neutral vessel has proceeded to an enemy port with false papers, she is liable to capture and condemnation "if she is encountered before the end of her *next* voyage." Unless neutral governments have acquiesced in these Napoleonic restrictions upon neutral commerce, and thereby estopped themselves from supporting diplomatic claims of their citizens sustaining injury by these violations of international law, it would seem that Great Britain is laying the ground for a large number of just pecuniary claims by neutral nations on behalf of their citizens. The recently established "submarine blockade" of Great Britain by Germany, which has already resulted in the sinking of neutral ships, and Great Britain's recently instituted quasi-blockade of Germany, incidentally interdicting commerce with neutral European ports, will undoubtedly give rise to numerous pecuniary claims.

¹ Comp. Gen. des Asphaltes (Gt. Brit.) v. Venezuela, Feb. 13, 1903, Ralston, 331,

of a port causing an abandonment of the voyage was held to justify an award.¹ The rules relating to notice must be strictly followed, except in the case of a vessel having an intention to run a blockade.² The penalty for violation of the blockade is confiscation of vessel and cargo, for knowledge of the owner of the cargo is presumed. Numerous international claims have been brought arising out of the decisions of prize courts which had condemned and confiscated vessels for violation of a blockade.³

Prize courts are established in the interests of neutrals and belligerents. The belligerents wish to be protected by a decision of these municipal courts, instituted by themselves, against the claims of neutrals based on alleged unjustifiable captures. Numerous claims have been paid on account of unlawful seizures of neutral vessels or cargo, where the prize court held the seizure to have been illegal and without probable cause.⁴ As prize courts are municipal courts interpreting international law, their judgments are not necessarily internationally binding.⁵ Indemnities have frequently been awarded by arbitral courts or have been arranged through diplomatic settlements on claims arising out of wrongful condemnations by national prize courts.⁶ By Convention XII 336; *Orinoco Asphalt Co. (Germany) v. Venezuela*, *ibid.* 586; *De Caro (Italy) v. Venezuela*, *ibid.* 810; *Martini*, *ibid.* 819, and cases before the Anglo-Chilean Tribunal of 1893: *Williamson, Balfour (Gt. Brit.) v. Chile*, Recl. pres. al Trib. Anglo-Chileno, III, 335; *St. Mary's Bay*, *ibid.* 557.

¹ *Boyne, Monmouth and Hilja (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3923-3928.

² Hale's Rep. 127. See Portendic claims, in which France was held liable for failure to properly notify a blockade. 30 St. Pap. 581; 34 *ibid.* 1036; 42 *ibid.* 1377; Moore's Arb. 4937, and note in Lapradelle's Recueil, p. 538.

³ Moore's Arb. 3885-3923.

⁴ See, e. g., cases of the British schooners *E. R. Nickerson*, and *Wary* illegally seized during war with Spain, Sen. Doc. 396, 57th Cong., 1st sess., 32 Stat. L. 552; *The Eastry (Gt. Brit.) v. Japan*, Takahashi, *op. cit.*, 739, 358; *Manouba (France) v. Italy*, *supra*, 7 A. L. I. J., 629. Certain cases reported in Moore's Arb., ch. LXVI, p. 3815 *et seq.*

⁵ As between private parties, the decree of a prize court is a judgment in a proceeding *in rem*, and hence is conclusive against all the world as to matters within its jurisdiction. *Cushing v. Laird*, 107 U. S. 69.

⁶ Certain cases in Moore's Arb., ch. LXVI, p. 3815 *et seq.* and cases in Russo-Japanese War, Takahashi, *op. cit.*

See also treaties between United States and Venezuela, May 1, 1852, Malloy, II, 1842; United States and Two Sicilies, Oct. 14, 1832, 20 St. Pap. 277; France and

of the Second Hague Conference, as yet unratified, an international prize court to serve as a court of appeal from decisions of national prize courts was provided for.¹

A captured merchant vessel may not as a rule be destroyed instead of being conducted to a port of a prize court, since the transfer of title only becomes final after adjudication by a prize court. The few exceptions to this rule are based upon necessity, each country having its own regulations. A frequent justification for destruction is the unseaworthy condition of the prize which prevents sending her in for adjudication, or the inability of the captor to spare a prize crew.² If the capture is subsequently held by a prize court to have been lawful, the neutral owner of goods on the destroyed vessel appears to have no claim to indemnity.³

The seizure by a belligerent of any enemy or neutral vessel or cargo within the territorial waters of a neutral Power has given rise to numerous cases before prize courts. It is clear that such violation of neutral territory renders the belligerent liable to the neutral, and the latter may rightfully demand the restitution of the captured vessel.⁴ Lord

Brazil, Aug. 21, 1828, 15 St. Pap. 1242; United States and Portugal, Jan. 19, 1832, 19 St. Pap. 1379; Great Britain and Brazil, May 5, 1829, 18 St. Pap. 689; France and United States, July 4, 1831, Moore's Arb. 4447-4485.

¹ Oppenheim, § 192; Scott, J. B., *The Hague Peace Conferences*, ch. X, pp. 465-511.

² See Oppenheim, § 194, in which numerous grounds are stated which have justified destruction. Under the Oxford rules of the Institute of International Law (1913), destruction is only permitted if the safety of the captor ship or the success of actual present military operations requires it (Art. 104). In Arts. 107, 113 and 114 indemnities are provided for in case the capture, seizure or destruction is held unwarranted. See article by C. H. Huberich, *The destruction of neutral prizes and the German prize code*, 10 Illinois L. Rev. (1915), 5-10.

³ Oppenheim, § 194, and the *Glitra*, Hamburg prize court, Jan. 29, 1915 (note in 10 Ill. L. Rev. [1915], 10). But see probable effect of Art. 3 of Convention XII, Scott, 485. The leading authorities on German prize law are of the opinion that compensation is due to the neutral owner of goods on the destroyed vessel. Citations by C. H. Huberich in 10 Illinois L. Rev. (1915), 10.

⁴ Art. 3 of Convention XIII of the Second Hague Conference makes it obligatory upon such neutral Power to "employ the means at its disposal to release the prize with its officers and crew." Oppenheim, II, § 360; Scott, I, 620 *et seq.* See *The Florida*, 101 U. S. 37, a Confederate cruiser seized by United States in territorial waters of Brazil. On the reparation made to Brazil, see Moore's Dig. VII, 1090. See

Stowell and Justice Story in several prize cases decided in the early part of the nineteenth century, held that the claim for restitution could be made by the neutral government only,¹ and not by the captured vessel, for as between the belligerents the capture was rightful.² However, the British-American Mixed Commission of 1871, in passing upon the claim of the *Sir William Peel*, which was decided adversely to the vessel by the United States Supreme Court, held that a neutral vessel could institute a claim for capture in neutral waters, regardless of any protest by the territorial neutral.³ Affirmative duties are now incumbent upon a neutral to prevent any violation of his neutrality by a belligerent seizure in his territorial waters, for a breach of which his own responsibility may properly be invoked.⁴ In land warfare, injuries inflicted by belligerents in permitting bullets to fall into neutral territory, constitute a violation of the territorial sovereignty of the neutral and justify international reclamation against the wrongdoing belligerents. Violation of a nation's neutrality by a belligerent entails international responsibility.

§ 107. Neutral Obligations.

The state of war casts upon neutrals numerous duties incident to the maintenance of neutrality, for a violation of which duties liability is incurred either toward the belligerent or toward neutrals who sustain injury thereby.⁵ A neutral must prevent a belligerent from setting

also *The Chesapeake*, Moore's Dig. VII, 937, and cases mentioned in same volume, § 1334.

¹ *The Diligentia*, 1 Dodson, 412; *Eliza Anne*, 1 Dodson, 244 (*dictum*); *The Anna*, 5 Rob. 373; *The Sir William Peel*, 5 Wall. 517; *The Anne*, 3 Wheat. 447. See also Dana's Wheaton, § 430 and note; *The Twee Gebroeders*, 3 Rob. 162, and Oppenheim, II, § 362.

² *The Anne*, 3 Wheat. 447; *The Sir William Peel*, 5 Wall. 517.

³ *The Sir William Peel* (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3948; Lawrence's Wheaton, 2nd ed., 716.

⁴ Oppenheim, II, §§ 360-363. See Commodore Stewart's case, 1 Ct. Cl. 113.

⁵ It will not be possible to refer to these duties in any detail. These obligations of neutrals are now largely codified in Convention V of the Second Hague Conference respecting the rights and duties of neutral powers and persons in war on land and in Convention XIII concerning the rights and duties of neutral powers in maritime war. See Scott, Hague Peace Conferences, I, 541 *et seq.*, 620 *et seq.*; Oppenheim, II, § 313 *et seq.*; Westlake, II, 117-119, 284-287, 321-331; Moore's Dig. VI, § 1050; Dupuis,

up prize courts on his neutral territory. This practice was not considered illegitimate in the eighteenth century, but after the United States in 1793 had refused permission to France to set up prize courts in United States territory, it became the recognized rule that such a use of neutral territory by belligerents is a violation of neutrality and entails responsibility on the part of the neutral.¹ This rule is confirmed by Article 4 of Convention XIII of the Second Hague Conference.²

So far as lies in his power, a neutral must prevent a belligerent man-of-war from cruising within his territorial waters for the purpose of capturing enemy vessels leaving his ports. It has already been observed that a neutral must use diligence to prevent hostilities being carried on in his territorial waters, and that an enemy attacked may invoke this neutral protection, for a failure to extend which the neutral is liable.³

One of the most important duties which the obligation of impartiality makes incumbent upon neutrals is the use of "due diligence"—in Articles 8 and 25 of Convention XIII, it reads "the means at [their] disposal"—to prevent their subjects from building and fitting out vessels within their jurisdiction or the departure of vessels intended

Le droit de la guerre maritime, Paris, 1912, ch. 12. On Convention V, see A. S. de Bustamante in 2 A. J. I. L. (1908), 95-120; Einicke, P., Rechte und Pflichten der neutralen Mächte im Seekrieg, Tübingen, 1912.

¹ Wheaton, as representative of the United States, obtained heavy indemnities from Denmark for such breaches of neutrality during the Napoleonic Wars. Treaty of March 28, 1830, Moore's Arb. 4549-4573. Spain was similarly held liable under the Florida treaty of Feb. 22, 1819, Moore's Arb. 4487, 4513. The United States assumed heavy liabilities under Art. 7 of the Jay treaty of Nov. 19, 1794, for such use of its territory by France. Moore's Arb. 3967 *et seq.*, 3981; Moore's Dig. VI, § 1050.

² Oppenheim, II, § 327.

³ But where the claimant vessel began the hostilities upon her captor, she forfeits neutral protection. The *Anne*, 3 Wheat. 435. The claim of the Brig *General Armstrong* (U. S.) v. Portugal, attacked by a British vessel in Fayal, was dismissed because the brig had failed to notify the Portuguese authorities of the necessity of protection and because they were not physically in a position to protect. Moore's Arb. 1071-1132; Moore's Dig. VI, 1000 and authorities there cited. The decision has been severely criticized. Lapradelle and Politis, Recueil, I, 650 *et seq.* If the recent report of the sinking of the German cruiser *Dresden* by a British war-vessel in territorial waters of Chile proves true, it is possible that Germany will make a claim upon Chile, and it seems certain that Chile would have a good claim against Great Britain.

for warlike purposes, and to prevent either belligerent from making use of neutral ports as a base of naval operations.¹

While a neutral Power incurs no responsibility from the fact that individuals leave its territory to enlist in the service of a belligerent, it is responsible if it permits enlistment on its territory by either of the belligerents.² It is also bound to use due diligence to prevent hostile expeditions from being organized in its territory to operate against either belligerent.³ A neutral Power, however, is not bound to prevent the export or transit of arms or anything which may be of use to an army or fleet.⁴ Such trade is merely subject to the belligerent rights of capture as contraband, the neutral state incurring no responsibility in the matter.

§ 108. State Indemnity.

It remains merely to note that it is becoming a growing practice for nations to alleviate the individual losses sustained during war, for which no legal liability is incurred, by making voluntary awards of indemnity as a matter of grace and favor, in order to distribute the loss equally over the whole nation. This beneficent practice was begun by France in 1792 and other states have from time to time followed this worthy example.⁵ The statute making the appropriation may limit the classes

¹ These obligations had their origin in the Three Rules of Washington, applied in the Geneva Arbitration, Moore's Arb. 4057-4178. See Convention XIII, 2nd Hague Conference, Arts. 6 *et seq.*; Hershey, ch. XXXI.

² Arts. 4 and 6 of Convention V. The United States and British neutrality laws which prohibit citizens and subjects from enlisting within the jurisdiction (or by British law, even without his Majesty's Dominions) exceed the requirements of international law.

³ But its negligence must be clearly proved. See cases in Moore's Arb. 4027-4056.

⁴ Art. 7 of Convention V.

⁵ France, law of Aug. 11, 1792, Feb. 27, 1793, Nys, III, 456, 458; Law of Sept. 6, 1871, July 28, 1874 and Aug. 16, 1876, 65 St. Pap. 71 and 621; For. Rel., 1884, 357. Bentwich, pp. 42-43, cites various cases of voluntary indemnities in France, Germany, Italy and Great Britain. Germany in 1871 extended the indemnity to Germans and, in the case of movables, to subjects of such neutral states only as promised reciprocal treatment in a similar case. Moore's Dig. VI, 905, and especially Kirchenheim, s. V^o Kriegsschäden, in Stengel-Fleischmann's Wörterbuch, Tübingen, 1913. Bentwich cites England's generous conduct after the South-African War (p. 44). Great Britain also made compensation to deported neutrals. 26 Law Mag. and Rev., 486; For. Rel., 1903, 479-480; 28 Clunet (1901), 189. See also U. S. Act of April 9,

of the beneficiaries as the state deems best, so that occasionally foreigners have not been included among those indemnified. By treaty, diplomatic arrangement or arbitral convention the Latin-American states and certain others among the weaker countries have at times been compelled by the nations of Europe to assume a heavy liability, beyond that required by the strict rules of law, for injuries sustained by aliens during war.¹

The war indemnities which are often exacted from the conquered nation by the victor at the end of a war frequently have been used in part to compensate subjects who have sustained injury during the war.²

The growing tendency to impose upon belligerents and neutrals a strict compliance with the rules of war in the interests of private property, under penalty of pecuniary liability, and to regard war as a national disaster, the burdens of which shall be distributed equally over the whole nation, should not be permitted to be interrupted or impaired.

1816, *supra*, and Abandoned or Captured Property Act; *Briggs v. U. S.*, 143 U. S. 346. Latin-American states often establish claims commissions after a civil war for deciding claims arising out of war injuries. See also treaty between United States and Switzerland, Nov. 25, 1850, Art. 2, Malloy, II, 1765, providing for equality with natives with respect to war indemnities.

¹ Many European countries pressed claims against Chile arising out of her war of 1879-1883 with Bolivia and Peru. Large indemnities were paid. *Moore's Arb.* 4916 (Germany). Some were submitted to arbitration. *Seijas*, V, 544-551; 73 St. Pap. 1211; 79 *ibid.* 670 (Italy); *Martens*, *Nouv. rec. gén.*, 2^e ser., 11, 638 (Belgium); 74 St. Pap. 128, 131, and 79 *ibid.* 671 (France); 77 St. Pap. 826 (Switzerland); 82 St. Pap. 1292 (Portugal); 76 St. Pap. 98; *Martens*, *Nouv. rec. gén.*, 2^e ser., 12, pp. 507-509 (Austria-Hungary). See also *For. Rel.*, 1883, 97 and *For. Rel.*, 1896, 42. See also claims conventions between Italy and Uruguay, Apr. 5, 1873, 63 St. Pap. 1322; Sardinia and Argentine, August 31, 1858, 49 St. Pap. 477, 480; Great Britain-France and Uruguay, June 28, 1862, 63 St. Pap. 1063; France and New Granada, Ecuador and Venezuela, 49 St. Pap. 1301; Great Britain and Nicaragua (seizures of neutral property and personal injuries) *For. Rel.*, 1894, App. I, 234-363; *Moore's Arb.* 4966; Great Britain and China, 1899 (*Kowshing* case), *Parl. Pap.* (Cd. 93) China, No. 1, 1900.

² *E. g.*, France *v.* China, treaty of Oct. 25, 1860, Art. V, *Hertslet's China Treaties*, 3rd ed., London, 1908, I, 289; France and Madagascar, French domestic commission, March 18, 1886, 77 St. Pap. 801, 78 St. Pap. 708; Great Britain and South African Republic, Aug. 3, 1881, 72 St. Pap. 900; Brazil and Paraguay, Jan. 9, 1872, *La Fontaine*, 167-170; Chile and Peru, Oct. 20, 1883, Art. 12, *La Fontaine*, 592, 593.

CHAPTER VII

INTERNATIONAL RESPONSIBILITY OF THE STATE—Continued. CONTRACTUAL CLAIMS

§ 109. Exceptional Position of Claims Arising out of Contracts.

Diplomatic protection is often invoked by citizens of one country in cases arising out of contracts entered into with citizens of another, or with a foreign government. Coincident with the constant growth of international intercourse and the exploitation of backward countries by foreign capital, this class of cases has assumed large proportions and has given rise to many perplexing and delicate diplomatic situations. The United States and one or two other important governments have differentiated these claims from tortious claims arising out of direct injuries committed by an authority of the state against the person or property of their citizens, either by declining to interpose in behalf of their contracting citizens or else by exercising more than ordinary scrutiny over a cause of action having its origin in contract. Fundamentally, it is the denial of justice which is the necessary condition for the interposition of a government on behalf of its citizen prejudiced by breach of contract. As a general rule, before a claim originating in a contract can come within the category of a denial of justice it must have been submitted to the courts for such judicial determination as is provided by the local law or in the contract. Until such submission, the government's right of interposition has not yet accrued. The qualifications of this principle will be considered hereafter.

§ 110. Three Classes of Contractual Claims. Distinctions.

There are three important classes of contract claims: first, those arising out of contracts concluded between individuals who are citizens of different countries; second, those arising out of contracts between the citizen and a foreign government; and third, claims arising out of the unpaid bonds of a government held by the citizen of another. The

failure of some publicists to distinguish these classes clearly in their discussion of the subject, especially the failure to distinguish the second from the third class, has brought about some confusion. When they state, as many of them do, that on principle there can be no intervention in claims arising out of contract, they really mean to confine their assertion to the case of claims arising out of unpaid bonds and *not* contracts in general. This distinction, as will be observed hereafter, is important, inasmuch as there is far less reason for governmental intervention to secure the payment of defaulted bonds of a foreign government than there is in the case of breaches of concession and similar contracts.

Hall fails properly to note the distinction between contract and other claims. He recognizes that there is a difference in the practice of governments in supporting claims arising out of a default of a foreign state in paying the interest or principal of loans made to it, and the complaints of persons sustaining injury in other ways. He admits that in the former case governments generally decline interposition, whereas in the latter it is a matter of expediency whether in the particular case their right of interposition shall be exercised. After giving the reasons why public loans should not become a cause of international intervention, he states that, fundamentally,

“there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the state, as itself the wrongdoer, is immediately responsible.”¹

While the statement is technically correct, it is apt to be misleading, inasmuch as it treats ordinary contract claims and those arising out of tort as forming one class, whereas there is an essential difference between them. This consists in the fact that in the case of contractual claims the active notice taken by the state of the wrong done its citizen is deferred until he has exhausted his local judicial remedies and a denial of justice is established, whereas in claims arising out of tort, if chargeable to a government authority, interposition is generally im-

¹ Hall, 6th ed., 275-276. See also Findlay, commissioner, U. S.-Venezuelan commission of Dec. 5, 1885, who considered the difference one in degree only. He believed that a contractual claim for building a public work and one founded on non-payment of a public debt are the same, both being voluntary engagements. Opinions of the commission (Washington, 1890), 335, Moore's Arb. 3650.

mediate; and in the further fact that wider discretion is usually exercised by the protecting state in the enforcement of contractual claims than of those purely tortious in origin.

Westlake is one of the few writers who properly distinguish the case of ordinary contract claims—for example, those arising out of supplies furnished the government or out of concession contracts concluded between a citizen and a foreign government—and the case of unpaid bonds which constitute part of a public loan.

In the case of ordinary contract claims, he says,

“there is a petition of right, a court of claims, or an appropriate administrative tribunal before which to go. The case is not essentially different from any other arising between man and man. The foreigner who has contracted with the government has not elected to place himself at its mercy, and the rule of equal treatment with nationals requires that he shall have the full benefit of the established procedure, while if in a rare instance there is no such established procedure, or it proves to be a mockery, the other rule of protecting subjects against a flagrant denial of justice also comes in. But public loans are contracted by acts of a legislative nature, and when their terms are afterwards modified to the disadvantage of the bondholders this is done by other acts of a legislative nature, which are not questionable by any proceeding in the country. If therefore the rule of equal treatment with nationals be looked to, the foreign bondholder has no case unless he is discriminated against. And if the rule of protecting subjects against a flagrant denial of justice be looked to, the reduction of interest or capital is always put on the ground of the inability of the country to pay more—a foreign government is scarcely able to determine whether or how far that plea is true—supposing it to be true, the provisions which all legislations contain for the relief of insolvent debtors prove that honest inability to pay is regarded as a title to consideration—and the holder of a bond enforceable only through the intervention of his government is trying, when he seeks that intervention, to exercise a different right from that of a person whose complaint is the gross defect of a remedial process which by general understanding ought to exist and be effective.”¹

CONTRACTS BETWEEN INDIVIDUALS

§ 111. Absence of Governmental Interest.

The first class of cases, contracts between individuals, can give rise only to an action in the courts for breach of contract. The government of the foreigner is in no wise concerned unless the local courts deny or

¹ Westlake, I, 2nd ed., 332-333.

unduly delay justice, in which event the government's right of interposition rests on the denial of justice alone and disregards the fact that the claim had its origin in a contract. This rule has generally been followed by the governments of contracting citizens, and has been applied by international commissions.¹

CONTRACTS BETWEEN CITIZEN AND FOREIGN GOVERNMENT

§ 112. Formal Interposition not Customary.

A more doubtful case arises where the contract has been concluded between the citizen and the foreign government. It is not proposed here to discuss the question of unpaid bonds, for this is a distinct branch of the subject, although some writers do not observe it as such. The contracts now in question are such as are made with the foreign government for the supply of material, for the execution of public works, or for the exercise of concessions of various kinds. Here again the general rule followed by the United States, although not by all other governments, is that a contract claim cannot give rise to the diplomatic interposition of the government unless, after an exhaustion of local remedies, there has been a denial of justice, or some flagrant violation of international law. The use of good offices is, however, usually sanctioned. While the rule is fairly clear, its application and its exceptions are vague, due principally to the fact that the intervening government interprets for itself what is a denial of justice and frequently concludes that harsh treatment of its contracting citizen by the foreign government constitutes a tortious act which takes the case out of the ordinary rule. Broadly speaking, we might state the rule as follows: Diplomatic interposition will not lie for the natural or anticipated consequences of the contractual relation, but only for arbitrary incidents or results, such as a denial of justice or flagrant violation of local or international law.²

¹ *Smith (U. S.) v. Mexico*, Act of Congress, Mar. 3, 1849, Moore's Arb. 3456; *Rowland (U. S.) v. Mexico*, Mar. 3, 1849, Moore's Arb. 3458; *Hayes (U. S.) v. Mexico*, Mar. 3, 1849, Moore's Arb. 3456; *Chase (U. S.) v. Mexico*, Moore's Arb. 3469-70; *La Guaira Light & Power Co. (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 182.

² F. de Martens, in his essay "*Par la justice vers la paix*" (pp. 30-31), supports the rule of non-interference by the government until the claimant has appealed to the local courts and justice has been denied. Even then he suggests a preliminary judicial examination into the justice of the claim by the government of the claimant.

There are several reasons why governments are and should be less zealous in pressing the claims of their citizens arising out of breach of contract than those arising out of some tortious act. The first reason is that the citizen entering into a contract does so voluntarily and takes into account the probabilities and possibilities of performance by the foreign government. He has in contemplation all the ordinary risks which attend the execution of the contract. In the second place, by going abroad, he submits impliedly to the local law and the local judicial system. The contract or the law provides remedies for breach of contract. These he must pursue before his own government can become interested in his case. In the third place, practically every civilized state may be sued for breach of contract. Even the United States, which renders itself less amenable to suit at the hands of injured individuals than perhaps any other country, recognizes its liability for illegal breaches of contract.¹ In England, a petition of right is rarely refused; in the United States, the Court of Claims, or a similar body in most of the states, has jurisdiction; in France and some other countries, the Council of State or some administrative body is the proper forum for suits against the state; in Latin-America, the Supreme Court is generally given jurisdiction.

The exceptions to this requirement of exhausting local remedies occur first, where the local judicial organization is so corrupt, or the possibility of local remedy so remote, that it would be folly to compel a citizen to submit his cause of action to local courts. The fact that the protecting government determines for itself the existence of these qualifying conditions renders the application of the rule uncertain. Secondly, where the breach is one not within the contemplation of the contracting parties, but partakes of the nature of an arbitrary tort, the protecting government will relieve its citizen from the ordinary rule of submission to local courts. The position of the injured individual and the protecting government is the same as in cases of ordinary tortious acts of the defendant government and justifies interposition.

See also Martens' *Traité de droit international*, vol. I, 446-447. See also Fiore, P., *Nouveau droit int. public* (Paris, 1885, Antoine's trans.), § 651; Lomonaco, *Diritto internazionale pubblico* (Napoli, 1905), 218-219.

¹ Revised Statutes, § 1059, par. 1; § 1060; § 1068; Act of March 3, 1887 (Tucker Act), 24 Stat. L., 505, § 1.

The early publicists seem to have justified reprisals by a government for default of obligations due its citizens on the part of another government. Grotius appears to have sanctioned reprisals for the collection of debts due to subjects from a foreign power, notwithstanding the fact that the claim to be thus satisfied had been submitted to the courts of the government in default and by them pronounced unfounded.¹ Vattel similarly justified hostile action to enforce contracts concluded between a citizen and a foreign government. But Vattel admits that before the claimant nation proceeds to such extremities (reprisals) it must be able to show that it

“has ineffectually demanded justice, or at least that [the claimant] has every reason to think it would be vain . . . to demand it.”²

From that time on, the conviction has gained ground that an attempt to exhaust local justice must be shown before diplomatic pressure or hostile action is warranted. Modern writers generally agree that where the citizen has at his disposal the legal means of asserting his rights and obtaining reparation of his injury by judicial proceedings, the interposition of his government is unjustified, for

“to secure by diplomacy what the individual might secure judicially is to be deemed highly reprehensible.”³

As will be noted, contractual claims are among the first causes of complaint now largely removed from the field of *armed* conflict, through the adoption by the Second Hague Conference and the general ratification of the convention for the limitation—better, postponement—of the use of force to recover contract debts.

Coming now to the practice of governments, it cannot be said that the countries of continental Europe make any substantial distinction between claims arising out of contract and those arising out of other acts.⁴ The United States, however, and at times Great Britain, have

¹ Grotius, *De jure belli ac pacis*, 3, 2, 5; cf. 1, 5, 2 and 2, 25, 1.

² Vattel, *Law of nations* (Chitty-Ingraham edition, Phila., 1855), Bk. II, ch. 18, §§ 343, 347, 354; ch. 14, §§ 214–216. See also Wheaton (*Lawrence's* edition, 1863), 510.

³ Fiore, P., *Nouveau droit international public* (Antoine's trans.), I, § 651. Martens, *Traité de droit international*, 446.

⁴ Germany, Italy and France have at times intervened diplomatically in favor of

limited their protection considerably in the case of ordinary contract claims. The fact that the citizen entered voluntarily into the contract seems to have been a determining factor in the policy of the United States not to interpose diplomatically in behalf of its citizens prejudiced through breach of a contract concluded by them with a foreign government. John Quincy Adams' declaration as Secretary of State has been quoted frequently by his successors in the Department of State. Adams' ruling was as follows:

"With regard to the contracts of an individual born in one country with the government of another, most especially when the individual contracting is domiciliated in the country with whose government he contracts, and formed the contract voluntarily, for his own private emolument and without the privity of the nation under whose protection he has been born, he has no claim whatsoever to call upon the government of his nativity to espouse his claim, this government having no right to compel that with which he voluntarily contracted to the performance of that contract."¹

Mr. Marcy in 1856 made the following apt statement of the rule of the Department of State:

"The government of the United States is not bound to interfere to secure the fulfillment of contracts made between their citizens and foreign governments, it being presumed that before entering into such contracts the disposition and ability of the foreign power to perform its obligations was examined, and the risk of failure taken into consideration."²

their subjects in cases arising out of contract, without any question as to the propriety of such action. Germany's and Italy's attitude was shown in the action against Venezuela in 1902, although claims, other than contractual, were included in the causes of complaint. See Dulon in 38 Amer. Law Rev. 650, and Brook in 30 Law Mag. & Rev. 165. See also case of Kronsberg, a German engineer, against Roumania in 1871, Tchernoff, *Protection des nationaux à l'étranger*, 188; Martens' *Traité*, I, 70. See the French action against the Dominican Republic, 1894, *For. Rel.*, 1895, I, 235-243, 397-402.

¹ John Quincy Adams, Secretary of State, to Mr. Salmon, April 29, 1823, *Am. St. Pap.*, *For. Rel.*, Vol. 5, 403, quoted in Wharton, II, 654, Moore's *Dig.* VI, 708, and notes there cited. See also the Landreau case, Sec'y of State Bayard to Mr. Cowie, June 15, 1885, Moore's *Dig.* VI, 715; and the Fiedler case, Mr. Bayard, Sec'y of State, to Mr. Jarvis, Mar. 22, 1886, Moore's *Dig.* VI, 715.

² Mr. Marcy, Sec'y of State, to Mr. Fowler, July 17, 1856, Wharton, II, 655. To the effect that the government is not a collecting agency for claims for services rendered to foreign governments, see Seely's case (services as legal counsel), 6 *Op. Atty. Gen.*

§ 113. Use of Good Offices Authorized.

While diplomatic interposition or pressure is declined, the use of friendly good offices by the diplomatic representatives of the United States abroad is authorized. Secretary Fish expressed as follows the practice of the Department in this respect:

"Our long-settled policy and practice has been to decline the formal intervention of the government except in cases of wrong and injury to persons and property, such as the common law denominated *torts* and regards as inflicted by force, and not the results of voluntary engagements or contracts.

"In cases founded upon contract the practice of this government is to confine itself to allowing its minister to exert his friendly good offices in recommending the claim to the equitable consideration of the debtor without committing his own government to any ulterior proceedings."¹

What is meant by "good offices" and the extent to which they may be exerted has on several occasions been construed by secretaries of State. Mr. Fish defined the use of "good offices" as a direction to a diplomatic agent

"to investigate the subject, and if [he] shall find the facts as represented [he] will seek an interview with the minister for foreign affairs and request such explanations as it may be in his power to afford."²

Good offices are in the nature of unofficial personal recommendations and are not tendered officially, although apparently the government may authorize or direct a diplomatic representative to extend them. Perhaps the best statement of the practice of the United States in the matter of contract claims was made by Secretary Bayard in 1885:

"It is not necessary to remind you that an appeal by one sovereign on behalf of a subject to obtain from another sovereign the payment

386 (March 17, 1854). See also *dictum* in 108 U. S. 90. Contrary to an almost absolute rule, the Department of State allowed the claim of General Frederick Ward for military services rendered to China, out of the Boxer Indemnity, although various administrations had declined to press the claim (For. Rel., 1888, I, 199).

¹ Mr. Fish, Sec'y of State, to Mr. Muller, May 16, 1871, Wharton, II, 656, Moore's Dig. VI, 710. See the long list of cases cited by Wharton, II, 655, and by Moore, VI, 705-707, in support of the rule that "it is not usual for the Government of the United States to interfere, except by its good offices, for the prosecution of claims founded on contracts with foreign governments."

² Mr. Fish, Sec'y of State, to Mr. Osborn, Mar. 4, 1876, Wharton, II, 658; Moore's Dig. VI, 711.

of a debt alleged to be due such subject is the exercise of a very delicate and peculiar prerogative, which, by principles definitely settled in this Department, is placed under the following limitations:

"1. All that our government undertakes, when the claim is merely contractual, is to interpose its good offices; in other words, to ask the attention of the foreign sovereign to the claim; and this is only done when the claim is one susceptible of strong and clear proof.

"2. If the sovereign appealed to denies the validity of the claim or refuses its payment, the matter drops, since it is not consistent with the dignity of the United States to press, after such a refusal or denial, a contractual claim for the repudiation of which there is by the law of nations no redress. . . .

"3. When the alleged debtor sovereign declares that his courts are open to the pursuit of the claim, this by itself is a ground for a refusal to interpose. Since the establishment of the Court of Claims, for instance, the government of the United States remands all claims held abroad, as well as at home, to the action of that court, and declines to accept for its executive department cognizance of matters which by its own system it assigns to the judiciary.

"4. When this Department has been appealed to for diplomatic intervention of this class, and this intervention is refused, this refusal is regarded as final unless after-discovered evidence be presented which, under the ordinary rules applied by the courts in motions for a new trial, ought to change the result or unless fraud be shown in the concoction of the decision."¹

Even good offices will, however, be refused

"when the debt was of a speculative character, or when it was incurred to aid the debtor government to make war on a country with which the United States was at peace."²

From this it may be inferred that the Department of State takes some official interest in the extension of good offices.

The United States will not promise protection in advance to secure the execution of a contract between a citizen and a foreign government. The American-China Development Company in entering upon contracts with China requested such advance protection and alleged that the English investors in their enterprise would receive such guaranty from the British Foreign Office. Secretary of State Day gave as the reason for his unwillingness to extend such a guaranty as the British

¹ Mr. Bayard, Sec'y of State, to Mr. Bispham, June 24, 1885, Wharton, II, 656; Moore's Dig. VI, 716.

² Mr. Seward, Sec'y of State, to Messrs. Leavitt & Co., May 6, 1863, Wharton, II, 656; Moore's Dig. VI, 710.

government was said to have extended, that the British Crown, exercising the executive power in Great Britain, possesses both the war-making and the treaty-making power, and is therefore authorized, in international relations, to give guarantees and enter into engagements which the Executive of the United States would not alone be competent to assume.¹

Secretary Marcy in 1855 gave a somewhat similar explanation for the unwillingness of the United States to interfere officially in a case of alleged breach by a foreign government of a contract with citizens of the United States.² The possibility of Congress declining to support the action of the Executive does not, however, appear to have been as prominently in the minds of other secretaries of State in dealing with international claims. While the Department of State will rarely protest in advance against a proposed law of a foreign country interfering merely with contractual rights of American citizens, there have been occasions where such action was taken.³

The general belief that Great Britain does not in practice interfere in claims arising out of contract, is erroneously based upon the frequently quoted circular of Lord Palmerston, Secretary of State for Foreign Affairs, directed in 1848 to the British representatives in foreign states.⁴ Palmerston declared that while the government had the *right* to intervene, it was merely a question of discretion with the British government whether the pecuniary claims of subjects should be taken up or not by diplomatic negotiation, and "the decision of that question of discretion turns entirely upon British and domestic considerations."⁵ This language is broad enough, indeed, to cover any class of claim, but

¹ Sec'y of State Day to Messrs. Cary & Whitridge, Aug. 24, 1898, in the case of the American-China Development Co., Moore's Dig. VI, 288.

² Mr. Marcy, Sec'y of State, to Mr. Clay, Minister to Peru, May 24, 1855, Moore's Dig. VI, 709.

³ Mr. Webster, Sec'y of State, to Mr. Letcher, Aug. 24, 1850, protesting against any violation, by decree, of the Tehuantepec concession, adding that this would be regarded as a national grievance. Sen. Doc. 97, 32nd Cong., 1st sess.

⁴ The instruction in full is printed in Phillimore, 3rd ed., London, 1882, II, 9-11.

⁵ In fact, Great Britain has often interposed to redress breaches of private contract. See, for example, the intervention in Bolivia in 1853, Lord Clarendon to Mr. Lloyd, 56 St. Pap. 1003, and the criticism of Great Britain's action by Baty, Int. law, 127. Great Britain freely extends good offices. See, for example, case of Dixon v. Portugal, 75 St. Pap. 1196.

it must be understood that Palmerston's ruling was made with reference to claims arising out of unpaid bonds of foreign states held by British subjects, a case in which formal interposition is for various reasons, as will be shown, even less justifiable than in the case of ordinary contracts.

§ 114. Qualifications of General Rule of Non-Interposition.

In applying the rule of refusing diplomatic interposition in contract claims, the United States has always been careful to limit its strict interpretation to cases entirely free from the qualifying factors of a denial of justice or other tortious element. If in any respect a denial of justice could be discerned in the case, or if any arbitrary act or confiscatory breach of the contract had taken place, the rule has been considered as no longer applying. A brief enumeration of these exceptions to the rule may be of interest.

1. The United States has on several occasions insisted that its citizens entering into foreign contracts shall have free and fair access to the courts and that the courts shall be so organized that the dispensing of justice may be presumed. Secretary of State Evarts once said that when a government does not hold itself amenable to judicial suit by foreign claimants on contracts made with it, their claims may be held to form an exception to the general rule as to contracts,¹ and in a subsequent case in Haiti, the Lazare case, Mr. Evarts added:

"the Government of the United States will insist on fair and impartial examination and adjudication by Haiti, without discrimination as to nationality, of a contractual claim of a citizen of the United States against Haiti."²

Mr. Bayard in stating the general rule of refusal to press contract claims excepted the case of discrimination against a citizen by the debtor government and a denial of a judicial remedy against it.³ In

¹ Mr. Evarts to Mr. Gibbs, Oct. 31, 1877, Wharton, II, 662. This statement occurs in Mr. Evarts' opinion in the case of *Sparrow v. Peru*, Moore's Dig. VI, 720. See also For. Rel., 1895-6, II, 1036-1055.

² Mr. Evarts to Mr. Langston, Minister to Haiti, Dec. 13, 1877, Moore's Dig. VI, 724. For a history of the Lazare case, see Moore's Arb. 1749 *et seq.*

³ Mr. Bayard, Sec'y of State, to Mr. Hall, Minister to Central America, Mar. 27, 1888, For Rel., 1888, I, 136. See also Moore's Dig. VI, 727.

the celebrated Idler case the fact that Venezuela had illegally invoked the remedy of *restitutio in integrum* and by executive action had arbitrarily changed the personnel of the court and district attorney for that particular case was held by the mixed commission under the convention of Dec. 5, 1885, to have been a denial of justice and to warrant an award.¹

2. Cases have frequently occurred in which the contracts of citizens of the United States with foreign governments were arbitrarily annulled by the contracting government without recourse to a judicial determination of the contract or of the legitimacy of its act. An act of this kind has generally been held by the Department of State to be a confiscatory breach of the contract and to warrant diplomatic interposition as in cases of tort. Any weakening of the judicial remedy of the citizen has been held equally to relieve the government from the ordinary rule of non-interposition in contract cases. The rule in such cases has perhaps been best stated by Lewis Cass, when Secretary of State, as follows:

"It is quite true, for example, that under ordinary circumstances when citizens of the United States go to a foreign country they go with an implied understanding that they are to obey its laws, and submit themselves, in good faith, to its established tribunals. When they do business with its citizens, or make private contracts there, it is not to be expected that either their own or the foreign government is to be made a party to this business or these contracts, or will undertake to determine any disputes to which they may give rise. The case, however, is very much changed when no impartial tribunals can be said to exist in a foreign country, or when they have been arbitrarily controlled by the government to the injury of our citizens. So, also, the case is widely different when the foreign government becomes itself a party to important contracts, and then not only fails to fulfill them, but capriciously annuls them, to the great loss of those who have invested their time and labor and capital from a reliance upon its own good faith and justice."²

In a previous communication to Mr. Lamar, Minister to Central America, Mr. Cass stated:

"What the United States demand is that in all cases where their citizens have entered into contracts with the proper Nicaraguan authorities, and questions have arisen or shall arise respecting the fidelity of

¹ Idler (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 3517.

² Mr. Cass, Sec'y of State, to Mr. Dimitry, May 3, 1860, Moore's Dig. VI, 287.

their execution, no declaration of forfeiture, either past or to come, shall possess any binding force unless pronounced in conformity with the provisions of the contract, if there are any; or if there is no provision for that purpose, then unless there has been a fair and impartial investigation in such a manner as to satisfy the United States that the proceeding has been just and that the decision ought to be submitted to."¹

The forcible deprivation of the property and franchises of a citizen of the United States without due process of law and a fair trial is considered as a tort and the claim will be pressed on that ground regardless of its contractual origin.²

Madison, at an early date in our history, distinguished between "compulsory measures" practiced upon United States citizens and "voluntary contracts," the possible results of which may be presumed to have been in the contemplation of the parties.³

Perhaps the most zealous interposition on the part of the United States has been in cases where the confiscatory act of the foreign government consisted in the arbitrary annulment of the entire contract or of some of its essential provisions without a resort to the courts.⁴

¹ Mr. Cass, Sec'y of State, to Mr. Lamar, Minister to Central America, July 25, 1858, Wharton, II, 661; Moore's Dig. VI, 723-724. See also Mr. Cass to Mr. Jerez, May 5, 1859, Moore's Dig. VI, 724; Mr. Bayard, Sec'y of State, to Mr. Scott, Minister to Venezuela, June 23, 1887, Moore's Dig. VI, 725.

² The interposition of the Department of State in the case of the New York and Bermudez Co. v. Venezuela was based on the ground that the company was deprived of its rights by an abuse of judicial process. Sen. Doc. 413, 60th Cong., 1st sess., 123-159. The U. S. and Venezuela Co. claim v. Venezuela, *ibid.* 95-118, which the Department was willing to submit to arbitration, was diplomatically settled by agreement of Aug. 21, 1909, For. Rel., 1909, p. 624.

³ Mr. Madison, Sec'y of State, to Mr. Livingston, Oct. 27, 1803, Moore's Dig. VI, 707.

⁴ Delagoa Bay Railroad case, *McMurdo (U. S.) v. Portugal*, For. Rel., 1900, 903; 1902, 848-852. See also Moore's Dig. VI, 727-728; Moore's Arb. 1865-1899. See the claim of Emery (U. S.) v. Nicaragua, settled by agreement of Sept. 18, 1909, For. Rel., 1909, 463.

For the *El Triunfo* case, *Salvador Commercial Co. (U. S.) v. Salvador*, see For. Rel., 1902, 838-880, and the learned arguments of W. L. Penfield, Solicitor of the Department of State, 839-848. See also the legal opinion (*Gutachten*) of Professor Ludwig von Bar, given at the request of the Government of Salvador, which is printed under the title "*Eine internationale Rechtsstreitigkeit*," in 45 *Jhering's Jahrbücher*, 161-210.

See also the case of *May (U. S.) v. Guatemala*, For. Rel., 1900, 648-674, *Jenner*,

Numerous other cases have occurred, particularly in Venezuela, where the arbitrary annulment of a contract by the Executive without appeal to the courts was held to justify diplomatic interposition and to render the government liable.¹ Nor has the presence of the Calvo clause in the contract, by which the alien contractor undertakes to make the local courts his final forum and to forego his right to claim the diplomatic protection of his own government, been considered as denying to the claimant's government the right to interpose in his behalf where there has been an arbitrary annulment of the contract by the local government. This conclusion has been based on one of several grounds. In some cases, the arbitrary action of the government was held to be a tort, thus rendering the construction of the contract unnecessary. In other cases, the arbitrary action and the failure of the government to secure a judicial construction in first instance was held to relieve the claimant from his own stipulation to resort to the local courts and forego the diplomatic protection of his government. In any event, it was held that the citizen could not contract away the right of his own government to interpose diplomatically in his behalf, the right of his government to intervene being superior to the right or competency of the individual to contract it away.²

Arbitrator, Moore's Dig. VI, 730. In *Oliva (Italy) v. Venezuela*, Feb. 13, May 7, 1903, it was held that claimant's unlawful expulsion, preventing compliance with the contract, was an arbitrary act, justifying damages for money expended and time lost. Ralston 771. See also *Paquet (Belgium) v. Venezuela*, March 7, 1903, Ralston, 269; *Aboilard (France) v. Hayti*, June 15, 1904, Arbitrators Vignaud, Renault and Solon Menos, 12 R. G. D. I. P. (1905), Documents, 12, 13-17; *Punchard et al., Antioquia Railway (Gt. Brit.) v. Colombia*, July 31, 1896, 88 St. Pap. 19; *La Fontaine, Pasierisie internationale*, 544; *Cedroni (Italy) v. Guatemala*, March 18, 1898, *La Fontaine, op. cit.*, 606; the concessions in the last case were gratuitous.

¹ Sen. Doc. 413, 60th Cong., 1st sess., p. 105. *Rudloff (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 187; *Kunhardt (U. S.) v. Venezuela*, Morris's Rep., Sen. Doc. 317, 58th Cong., 2nd sess., 189-190; *Selwyn (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 322; *North & South American Construction Co. (U. S.) v. Chile*, Aug. 7, 1892, Moore's Arb. 2318, and final settlement in *For. Rel.*, 1895, I, 85-86; *Milligan (U. S.) v. Peru*, Dec. 4, 1868, Moore's Arb. 1643.

² *Martini (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 819; *Selwyn (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 322; *Milligan (U. S.) v. Peru*, Dec. 4, 1868, Moore's Arb. 1643; *Delagoa Bay Railway case*, *McMurdo (U. S. and Great Britain) v. Portugal*, June 13, 1891, Moore's Arb. 1865; see also *International Law Association*, 24th Rep. (1908), address of Jackson H. Ralston, pp. 192, 193; Mr. Bayard to

3. Various acts of foreign governments have been construed as sufficiently arbitrary to warrant the United States in intervening in contract claims or to authorize international commissions to award indemnities. Thus, the proposed depreciation by Haiti of the value of certain bonds issued to American citizens for work and materials was held to justify the United States in protesting and eventually interfering.¹ Lord Salisbury,² the British Foreign Secretary, protested likewise against a proposed act of Peru tending to weaken certain security hypothecated to the holders of Peruvian bonds. So, the diversion of the security of certain revenue pledged to the payment of the claims of citizens of the United States, even when contractual in origin, has been held to warrant interposition.³

4. The United States has on several occasions intervened to secure the payment to one of its citizens of the damages arising through breach of contract by a foreign government where such breach involved an element of tort. Thus, the seizure by the President of the Dominican Republic of the Ozama bridge brought about the diplomatic interposition of the United States in behalf of Thurston, an American engineer who had built the bridge under contract with that government.⁴ The most recent case of this character was the arbitrary expulsion of Treasurer-General Shuster from Persia, in which case the Department of State took an interest and by its firm position helped to secure the full payment of salary for the entire unexpired time of the contract.⁵

5. The equitable character of the claim has at times induced the

Mr. Scott, Minister to Venezuela, June 23, 1887, Moore's Dig. VI, 725. *Infra*, § 371 *et seq.*

¹ Mr. Sherman, Sec'y of State, to Mr. Powell, Minister to Haiti, Oct. 26, 1897, Moore's Dig. VI, 729.

² Lord Salisbury, British Foreign Sec'y, to Señor Pividal, Peruvian Minister, Nov. 26, 1879, quoted from Parliamentary Papers in Moore's Dig. VI, 724.

³ *Walter (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3567-3568; *Moses (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3465. See also the cancellation of the Grefuhle concession in Zanzibar (France) *v. Great Britain*, 1892, *La Fontaine*, 618, Moore's Arb. 4939.

⁴ *Ozama Bridge claim, Thurston (U. S.) v. Dominican Republic*, For. Rel., 1898, 274-291.

⁵ Article of Clement L. Bouvé, Russia's liability in tort for Persia's breach of contract, citing note of Secretary of State Knox of Dec. 1, 1911, 6 A. J. I. L. (1912), 396-407.

Department of State to recede from its rigorous position of declining interposition where the claim originated in a contract.¹

Equitable considerations alone, however, have rarely induced any stronger action than the use of good offices.

6. Where a definite arrangement for the liquidation of the claim has been made between the alien and the government, it will generally be enforced by diplomatic pressure, notwithstanding its contractual origin.²

§ 115. Arbitration.

7. Whatever hesitation there may have been on the part of the Executive to interpose diplomatically in behalf of citizens injured through the breach of a contract concluded with a foreign government, the Department of State has generally been willing to submit contract claims to the adjudication of international commissions, and these commissions have in general exercised jurisdiction over contract claims as over other claims.³ In instructions given by Mr. Pickering on Octo-

¹ Mr. Evarts, Sec'y of State, to Sir E. Thornton, May 2, 1879, Wharton's Dig. II, 658; see also correspondence between Mr. Fish and Mr. Thomas in 1874 in the Landreau case *v. Peru*, Moore's Dig. VI, 714-715.

² Lord John Russell, British Foreign Sec'y, to Sir C. L. Wyke, Mar. 30, 1861, 52 St. Pap. 238, quoted also in Moore's Dig. VI, 719; Claim of Waring Brothers, railroad contractors (Gt. Brit.) *v. Brazil*, in which Great Britain insisted on the carrying out by Brazil of a decree which appropriated an indemnity for the loss sustained by Waring Brothers due to the government rescinding the contract. Moore's Dig. VI, 720-721, For. Rel., 1887, 54, 55. Sparrow claim *v. Peru*, For. Rel., 1895, II, 1036-1055; 1896, 492-494. The French claims against Venezuela liquidated under the convention of June 29, 1864, Moore's Dig. VI, 711-712. See also the settlement of the claim of W. R. Grace (U. S.) *v. Peru*, in which the failure of the government to carry out a judgment against it was construed as a denial of justice warranting diplomatic intervention. Mr. Neill to Mr. Hay, Sec'y of State, Nov. 19, 1903, For. Rel., 1904, 678.

³ Contract claims have been submitted to general mixed commissions dealing with general claims (as, for example, the U. S.-Mexican commissions of 1839 and 1868. the U. S.-Venezuelan commissions of 1885 and 1903 and many others) and to special commissions instituted to decide single claims (as, for example, the claim of Metzger & Co. (U. S.) *v. Haiti*, October 18, 1899, Day, Arbitrator, For. Rel., 1901, 262-276, and that of the San Domingo Improvement Co. (U. S.) *v. Dominican Republic*, Jan. 31, 1903, For. Rel., 1904, 270. See also Bordes (France) *v. Chile*, 1897, La Fontaine, 618 (award unpublished); Freraut (France) *v. Chile*, July 3, 1897, La Fontaine, 579. General mixed commissions have assumed jurisdiction of contract claims under the customary inclusive terms of the protocol "all claims," and even "claims" arising out of "injury to person or property of citizens."

ber 22, 1799, to the American plenipotentiaries to France, the envoys were directed to secure the adjustment of "all claims" of citizens of the United States against that government, and among these there were expressly enumerated the "sums due" to American citizens by contracts with the French government, or its agents.¹

By the convention between the two countries of April 30, 1803, for the "payment of sums due" by France to citizens of the United States, provision was made for the satisfaction of "debts."² In the treaty of February 22, 1819, between the United States and Spain, by which each government renounced "all claims" of its citizens or subjects against the other government, Mr. Adams, Secretary of State, considered that contract claims had been included among those renounced.³ Mr. Adams added that there was no doubt of the right of the government to include such claims in the provisions of the treaty.

Practically all international commissions, where the terms of submission in the protocol could be construed as sufficiently broad, have exercised jurisdiction over contract claims, for example, the United States-Spanish Commission of February 22, 1819, the three Mexican commissions of April 11, 1839, of March 3, 1849 (domestic) and of July 4, 1868, the United States-British Commission of February 8, 1853 and August 18, 1910, the United States-Peruvian Commission of January 12, 1863, the United States-French Commission of January 15, 1880, the United States-Venezuelan Commission of December 5, 1885, the Venezuelan Commissions of 1903 sitting at Caracas, and many others.⁴ A conflict arose in the commission of July 4, 1868, due to the

¹ Am. St. Pap., For. Rel., vol. 2, 242, 301, 303; see also Moore's Dig. VI, 707-708.

² Moore's Dig. VI, 708.

³ Moore's Dig. VI, 717-718; Moore's Arb. 4502-4505.

⁴ See Moore's Dig. VI, 718; Ralston, Report of Venezuelan Commissions; Moore's Arb. 3425-3590; J. Hubley Ashton, agent of the United States before the Mixed Commission with Mexico of July 4, 1868, in an elaborate argument in the case of the State Bank of Hartford (No. 535) and other similar cases, opposing a motion to dismiss for want of jurisdiction over contract claims, analyzed carefully the practice of the United States and the jurisdiction of international commissions in the matter of contract claims, especially under a protocol submitting "all claims . . . arising out of injuries to . . . person or property." He cited decisions of municipal courts and international tribunals to show that under the terms "all claims" and "injuries" breaches of contract were included. Among others he cited decisions of the commissions under the treaty with Spain, 1819 (8 Stat. L. 258); with Great Britain, 1853

difficulty of reconciling vacillating opinions with proper judicial action. Commissioners Wadsworth, Palacio and Umpire Lieber (though the latter was not always consistent) had allowed claims on contracts concluded between citizens of the United States and agents of Mexico for the furnishing of arms, munitions, and other material to the Mexican government, on the ground that the failure to pay for such goods constituted an "injury" to the "property" of an American citizen under the terms of the protocol. The Mexican commissioner, Palacio, while adhering to the view of his colleagues that contract claims were within the jurisdiction of the commission, believed that a demand and refusal of payment was a condition precedent to the allowance of the claim. Subsequently, upon the death of Dr. Lieber and the resignation of Commissioner Palacio, Sir Edward Thornton became umpire and Señor Zamacona the Mexican commissioner. Thereupon a different view was taken as to the jurisdiction of the commission over contract claims. Sir Edward Thornton considered that he ought to follow the practice of the Executive of exercising discretion in assuming jurisdiction of contract claims, for which reason, while admitting the jurisdiction of the commission over contract claims, he declined to allow such as were based upon voluntary contract, in the absence of clear proof of the contract and proof that gross injustice had been done by the defendant government. The decisions of the commission, therefore, are at times contradictory, claims of exactly the same nature having been allowed by Wadsworth, Palacio and Lieber, and rejected when Zamacona became the Mexican commissioner and Thornton the umpire.¹

(10 Stat. L. 998); with New Granada, 1857 (12 Stat. L. 985); with Costa Rica, 1860 (12 Stat. L. 1139); with Colombia, 1864 (13 Stat. L. 685); with Ecuador, 1862 (13 Stat. L. 633); with Peru, 1863 (13 Stat. L. 639); with Venezuela, 1866 (16 Stat. L. 316), and with Peru, 1868 (16 Stat. L. 349). He also mentioned the three Mexican commissions. The argument is on file in the Department of State Library.

¹ A full discussion of this perplexing question before the commission was undertaken by Commissioner Wadsworth in the case of Treadwell & Co. (U. S.) v. Mexico, July 4, 1868, quoted at length in Opinions of the Commission, vol. 4, 248, and vol. 7, 383. The claims were allowed in the cases of Manasse, Moore's Arb. 3462-3464; Iturria, *ibid.* 3464; Moses, Assignee, *ibid.* 3465; Newton, *ibid.* 3465; Morrill, *ibid.* 3465, and were disallowed by Thornton, umpire, in cases of supplies furnished, services rendered and other claims based on voluntary contract in the Phipps case, *ibid.*

There have been occasions when general international commissions have not exercised jurisdiction over contract claims.¹ It was agreed by the United States and Spain in the claims convention of February 12, 1871, that the arbitrators were not to have jurisdiction of claims growing out of contract.²

Where jurisdiction has been exercised by mixed commissions, as is the general rule, the contract has been examined as would any other instrument open to judicial construction.³ Among other factors the authority of the person contracting as agent for the government is always closely examined. The general rules of agency are applied,⁴ although municipal courts have made distinctions between cases in which the government rather than a private individual is the principal.

A contract for unneutral service will as a general rule not be enforced either by municipal⁵ or international⁶ courts. There have been a

3468; Treadwell, *ibid.* 3468; Pond, *ibid.* 3467; Nolan, *ibid.* 3484; Light, *ibid.* 3484. Wallace, *ibid.* 3475; Kennedy & King, *ibid.* 3474; State Bank of Hartford, *ibid.* 3473; Shumaker, *ibid.* 3472; Chase, *ibid.* 3469; Kearney, *ibid.* 3468; Sturm (*dictum*), *ibid.* 2756; Dennison, *ibid.* 2766; De Witt, *ibid.* 3466; Widman, *ibid.* 3467. Lieber's decision in disallowing the claim of Thore de Lespes for the hire of a steam tug to Mexico (*ibid.* 3466) is inconsistent with his other opinions.

¹ U. S.-British Mixed Commission of May 8, 1871. See Hubbell (U. S.) v. Great Britain, Moore's Arb. 3484-6; Hale's Rep. 40; Howard's Rep. 160, 752, 754.

² Agreement of Feb. 11-12, 1871, art. 15, Moore's Arb. 4802-4803.

³ Turnbull, Manoa, Limited, Orinoco, *et al.* (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 244, where Barge held a certain contract void *ab initio*. See also American Electric and Manufacturing Co. (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 250, where Barge held a promise to declare void an existing contract as an illegal promise. See also Frear (U. S.) v. France, Jan. 15, 1880, Moore's Arb. 3488-3491; Boutwell's Rep. 202, where it was found that the claimant had not performed the contract on his part.

⁴ Lew Wallace (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3475-3476, in which case the Mexican agent had acted beyond the scope of his authority, for which reason the contract was held not binding on Mexico. See also Beales, Nobles & Garrison case (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 3548-3564. In Zander (U. S.) v. Mexico, March 3, 1849, Moore's Arb. 3433, the failure to show the original authority of the agent or the subsequent ratification of his acts by the government barred the claim. In Trumbull (Chile) v. United States, Aug. 7, 1892, an award was made on the ground that claimant had a right to assume that the United States minister in engaging his legal services was authorized so to do; see *supra*, p. 183.

⁵ Kennett *et al.* v. Chambers, 14 How. 38; Du Wurtz v. Hendricks, 9 Moore's C. B. Rep. 586; see also Kent's Commentaries, I, 116.

⁶ Cucullu (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3478-3479; Fitch (U. S.) v.

few occasions where international commissions on the ground of equity or waiver of the illegality have made awards on unneutral contracts. This is especially so where the political party aided was successful or became at least a *de facto* government.¹

The domestic commission under the Act of March 3, 1849, held that while the United States was not justified in pressing a claim growing out of services in violation of the claimant's neutrality as a citizen of a neutral nation, yet if Mexico, the nation against whom such claim existed, sees proper to waive the objection and agrees to recognize the claim, the tribunal cannot assume for it a defense expressly waived.²

Speculative contracts are not enforced.³ The service itself where of an extraordinary character, such as the giving of advice in battle, has been held not measurable in money damages, but calling rather for a monument or some other mark of national gratitude.⁴ While it has been noted that as a general rule a claim for voluntary services is not pressed by the Department of State, international commissions, with the exception of the United States-Mexican Commission of 1868 after Thornton became umpire, have not hesitated to allow damages for services thus rendered. They have occasionally held, however, that a demand for payment must be made upon the debtor government.⁵

Mexico, July 4, 1868, *ibid.* 3476-3477; Wallace (U. S.) v. Mexico, July 4, 1868, *ibid.* 3475-3476.

¹ Lake (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2755, Opinion by Palacio, Commissioner; Chew (U. S.) v. Mexico, April 11, 1839, *ibid.* 3428, and other cases there cited; Hunter, Duncan *et al.* (U. S.) v. Mexico, April 11, 1839, Moore's Arb. 3427; Cucullu (U. S.) v. Mexico, July 4, 1868, *ibid.* 3478-3479; claims of Stephen Codman, No. 86, and John and Robert Gamble, No. 1783, were allowed by the mixed commission under the treaty with Spain of 1819, cited in Ashton's argument, *supra*.

² Meade (U. S.) v. Mexico, Act of March 3, 1849, Moore's Arb. 3430, 3432. Other commissions have held that only the nation whose laws have been violated can waive the illegality, and not the state aided by the unneutral act.

³ Taussig (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3472-3473, where the non-fulfillment of a contract for the sale of vessels, etc., to a government, said vessels having been purchased as a speculation on their subsequent sale, was held not to be an injury to person or property within the meaning of the protocol. See also Oliva (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 780; see also American Trading Co. v. Chinese Indemnity Fund, 47 Ct. Cl. 563, 569.

⁴ O'Dwyer (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 3568.

⁵ Cucullu (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3483. Palacio in a *dictum*

Where the debt has been acknowledged there is usually no hesitation either on the part of the government or of international commissions respectively to demand and to allow damages on claims arising out of contract.¹ Such acknowledgment has even been held to purge the

said that under the word "injury" a mere omission of payment of a debt makes it necessary to bring it to the knowledge of the defendant government. Throughout the commission Palacio held that notice and a refusal of payment were conditions precedent to a valid claim. *Union Land Company et al. (U. S.) v. Mexico*, Act of Congress, Mar. 3, 1849, Moore's Arb. 3440, service rendered in securing immigrants. *Meade (U. S.) v. Mexico*, Mar. 3, 1849, Moore's Arb. 3431, expenses incurred in fitting out vessel in service of Mexico. *The Hermon, Green (U. S.) v. Mexico*, April 11, 1839, Moore's Arb. 3425, repairs and ship stores furnished to a vessel of war. *Boulton et al. (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 26-29, carrying the mails. *Turini (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 51-52, services rendered as a sculptor. *The Great Venezuelan Railroad (Germany) v. Venezuela*, Feb. 13, 1903, Ralston, 638, railroad forcibly used to carry troops. *Hudson Bay Co. (Gt. Brit.) v. U. S.*, Feb. 8, 1853, Moore's Arb. 3459, goods supplied to shipwrecked sailors and other citizens of the United States to secure their relief from captivity by savage Indians and in repelling attacks, which service the government should have rendered. *Underhill (U. S.) v. Mexico*, Mar. 3, 1849, Moore's Arb. 3433, charter of a vessel. *Ulrick (U. S.) v. Mexico*, Mar. 3, 1849, Moore's Arb. 3434, lease of house for legation. *Eldredge (U. S.) v. Peru*, Jan. 12, 1863, Moore's Arb. 3462, supplies furnished to Peruvian army. *Dundonald (Gt. Brit.) v. Brazil*, Apr. 22, 1873, Moore's Arb. 2107-2108, military service rendered by Admiral Lord Cochrane. Arbitration between Great Britain and Portugal in 1840, for compensation due British soldiers and officers for services rendered to Portugal in her war of liberation, *La Fontaine*, 93, 636. It is not the policy of the United States to espouse claims for military service rendered to foreign governments, whether claims for gratuitous or statutory pensions, or payment of salary. Notwithstanding the uniform rule, the Department of State allowed out of the Boxer Indemnity, the claim of General Frederick Ward for services rendered in putting down the "Taiping Rebellion" in China. Several administrations had previously rejected the claim because of its character and intrinsic lack of merit. *For. Rel.*, 1888, I, 199.

On the services rendered to Mexico by American citizens see a pamphlet, "The Republic of Mexico and its American creditors. The unfulfilled obligations of the Mexican Republic to citizens of the U. S. from whom it obtained material aid on credit." (Indianapolis, Douglass & Conner, 1869, 94 p.)

¹ *Sparrow (U. S.) v. Peru*, *For. Rel.*, 1895, II, 1036-1055; settled in 1896, *For. Rel.*, 1896, 492-494; Lord J. Russell to Sir C. K. Wyke, Mar. 30, 1861, in the case of British bondholders whose unpaid bonds were converted into a liquidated debt against Mexico, 52 St. Pap. 238-239; *Cox & Elkins (U. S.) v. Mexico*, Mar. 3, 1849, Moore's Arb. 3430; *Parrott (U. S.) v. Mexico*, Mar. 3, 1849, *ibid.* 3430; *Eckford (U. S.) v. Mexico*, Mar. 3, 1849, Op. 435 (not in Moore); *Mercantile Insurance Co. (U. S.) v. Mexico*, Mar. 3, 1849, Moore's Arb. 3429; *Meyer (U. S.) v. Mexico*, Mar. 3, 1849, *ibid.* 2380; *Rosenwig, Crosby et al. (U. S.) v. Peru*, Dec. 4, 1868, *ibid.* 1651-

contract of illegality, as, for example, the unneutral character of the act.

BONDS OF PUBLIC DEBT

§ 116. Claims Arising out of Unpaid Bonds.

We may now consider the third class of contract claims, those arising out of a foreign government's unpaid bonds, held by a citizen. These obligations of the state differ in many respects from the contractual obligations arising out of a contract for concessions or the execution of public works. In the latter case, the government has entered into relations with a definite person; in the former, as bonds are usually payable to bearer and negotiable by mere delivery, the state never knows to whom it is indebted until the bonds are presented for payment.

Some publicists regard such a bond as a contractual obligation subject to the same rules, both in interpretation and enforcement, as ordinary contract debts.¹ Hall even goes so far as to liken in principle a breach of a monetary agreement, *e. g.*, the non-payment of public loans, to tortious injuries committed by the government, though he admits a difference in practice in enforcing the two classes of claims.² The unpaid bond of a foreign government held by a citizen has been a frequent and most perplexing cause of international conflict.

§ 117. Nature of Public Loan and Law Governing.

Before discussing the nature of the enforcement of rights arising out of public debts, it is desirable to examine the nature of the contract and the law governing the transaction of subscribing to the public loan of a foreign state. If the lending citizen is domiciled in the country emitting the loan, the contract may for many purposes be regarded as subject to the law of the debtor country. When, however, as is generally the case in external loans, the lending citizen or subsequent transferee-holder is domiciled not in the debtor country, but in his

1652; *Hammeken (U. S.) v. Mexico*, Mar. 3, 1849, *ibid.* 3471; *Corcuera (Spain) v. Venezuela*, Apr. 2, 1903, *Ralston*, 936.

¹ Vattel, Bk. II, ch. XIV, §§ 214-216; Phillimore, 3rd ed., II, ch. III, 8 *et seq.* See opinion of Findlay, commissioner, in case of *Aspinwall* before U. S.-Venezuelan commission of 1885, *Moore's Arb.* 3650.

² Hall, 6th ed., 276.

own or some other state, difficult questions in the conflict of laws and in international law are encountered. Is the transaction one of private or public law, and if private, what law governs its interpretation?

In the first place it may be admitted that a contract has been concluded. If it is a contract of private law concluded by the state in its capacity as an ordinary contractor (*jure gestionis*),¹ there would be some ground for asserting that the contract is subject to the local law of the debtor state,² or as the contract is often to be performed in the country of the lending citizen, where the interest and principal are sometimes to be paid, that the law of the place of performance governs. Again, the loan may be subscribed in a third state, as, for example, where a Chinese loan is underwritten by a New York banker, the individual bonds being held by citizens of Germany; the loan having been made in a third state, the *lex loci* might be regarded as the law governing the contract. Other possibilities have been suggested, as, for example, where the loan has been guaranteed, that the law of the guaranteeing state governs,³ or that the parties themselves may agree on the law governing the contract.⁴

If the contract were concluded between individuals or between a municipal corporation and an individual, the above theories might warrant consideration. The factor which makes the public loan a contract *sui generis* is that one of the contracting parties is a sovereign and therefore not subject to the ordinary rules of legal obligation, and

¹ We cannot here discuss the distinctions between contracts made by a government in its capacity as a business corporation and engagements contracted in its character as a sovereign. We may merely note the usual rule of the suability of the government on contracts of the former category, and its immunity in the case of contracts of the latter description. See *supra*, p. 127 *et seq.*, 170.

² Freund, G. S., *Die Rechtsverhältnisse der öffentlichen Anleihen*, Berlin, 1907, 64 *et seq.* This is probably the most thoughtful book on the subject of public loans. Loening, Edgar, *Die Gerichtsbarkeit über fremde Staaten und Souveräne*, Halle, 1903, 256 and authorities there cited. See also Freund, G. S. *Der Schutz der Gläubiger gegenüber auswärtigen Schuldnerstaaten*, Berlin, 1910, 14; Pflug, Karl, *Staatsbankrott und internationales Recht*, München, 1898, 15-16; Cuvelier in 20 R. D. I. (1888), 111.

³ Wuarin, Albert, *Essai sur les emprunts d'états*, Paris, 1907, 88 *et seq.*; Imbert, Henri M., *Les emprunts d'états étrangers*, Paris, 1905, 50 *et seq.*, 96.

⁴ Meile, Fr., *Das internationale Zivil- und Handelsrecht*, II, 57; Clerin, Georges, *Inexécution par un état de ses engagements financiers extérieurs*, Dijon, 1908.

the other a non-resident alien, against whom the local territorial law is not enforceable.¹ The debt is generally authorized and created by an act of legislation, which escapes all judicial review. The inherent reservation of the possibility of modifying the terms of the loan, suspending or even repudiating it by an act of sovereignty similar to that which created it, has led some writers to the conclusion that the obligation of the state is one of honor only, a moral, and not a legal obligation,² so far at least as its enforcement in municipal courts is concerned. Freund tells us that several German writers regard it as discretionary with the state whether it will take up foreign loans.³ Zorn even regards the payment of interest as the exercise of a sovereign right.⁴ The failure of a state therefore to take up a public loan, not being justiciable in municipal courts, has been regarded as not legally a breach of a contractual obligation. This confuses the *nature* of the contract with the *means* of its enforcement.

The foreign citizen would never lend his money on such uncertain security. He does in no sense regard himself as subject to the local law of the debtor state, as he has never entered its territorial jurisdiction. His rights as lender and the obligations of the debtor are derived from the contract of loan which neither the creditor nor his government regards as purely one of private law to be interpreted by the local courts of the debtor state.

The mixed private and public nature of the transaction of subscribing to a foreign loan shows that it partakes of the nature of an international contract, and that its breach, if not justiciable before municipal courts, does give rise, under certain circumstances, to the diplomatic interposition of the national government of the creditor, and in practice has at times resulted in armed intervention. These questions will be discussed hereafter.

The transaction of subscription to a foreign public loan is not

¹ Freund, *Der Schutz der Gläubiger*, etc., 15; Wuarin, *op. cit.*, 34.

² Bar, Ludwig von, *The theory and practice of private international law* (2nd ed., trans. by G. R. Gillespie, Edinburgh, 1892), 1152, and certain French cases there cited; Politis, Nicholas, E., *Les emprunts d'état en droit international* Paris, 1894, 280; Milanowitsch, cited by Freund, *Rechtsverhältnisse*, etc., 56.

³ Freund, *Schutz der Gläubiger*, 13.

⁴ Zorn in *Bankarchiv*, VI, 106, cited by Freund, *Schutz der Gläubiger*, 13.

purely an international contract, for this could be concluded only by states and not by a state and the subjects of another state. The contract is, however, by its nature under the protection of international law and is what Bluntschli called a quasi-international contract.¹ There is certainly some analogy between a contract (1) between Venezuela and Germany and (2) between Venezuela and a German citizen, for the building of a vessel or the borrowing of money. Neither contracting party in these cases would be willing to submit to the national municipal law of the other.

§ 118. Remedy in Municipal Courts.

If we turn to the jurisdiction of courts and the means of enforcement of the contract, the international nature of the legal relation created will become apparent. While in theory the jurisdiction of the courts of the debtor state may be invoked, several contingencies in connection with the public loan must always be borne in mind. First, the debtor state may or may not permit itself to be sued.² While most states now freely subject themselves to suit in cases of ordinary contracts, many states still decline to extend this right so far as the public debt is concerned. Many states of the United States have repudiated their debts and have declined to permit themselves to be sued on them.³ Again, as the public loan is created by legislation, an act of sovereignty, so it may be suspended, reduced or even repudiated by a similar act

¹ Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten*, Nördlingen, 1878, 3rd ed., §§ 442, 433 (b); Pflug, *op. cit.*, 40-41.

The argument against the international nature of the contract of public loan, that individuals cannot derive rights from international agreements, as they are not subjects of international law, has been greatly weakened by the Hague Convention for the establishment of an international prize court, and the growing opinion, shared by authorities like Westlake and Bonfils, that individuals may derive subjective rights from international agreements. See also art. 2 of the Convention establishing the Central American Court of Justice. See *supra*, § 9.

² *Twycross v. Dreyfus*, 36 Law Times Rep. (N. S.) (July 21, 1877), 752, 755. See also Moulin, *La doctrine de Drago*, Paris, 1908, 86 *et seq.*

³ Scott, William A., *The repudiation of state debts*, New York, 1893, particularly Chap. I, in which the constitutional and legal aspects, with the decisions of the Supreme Court and state courts are lucidly presented. The United States has considered itself not responsible for the debts of the repudiating states, and has therefore declined the proffer of foreign governments to arbitrate the claims of their nationals, holders of the repudiated bonds of these states.

of sovereignty, by which the national courts are bound. The creditor, therefore, is juridically opposed to a sovereign who may with perfect legality, by an act of sovereignty, deprive him of his substantive right and of his remedy. In other words, the state in the exercise of its sovereign powers may regulate the execution of its contract of loan in any manner conformable with its public interest.¹ Again, the improbability in many states of securing an impartial judicial determination by national courts in cases of this kind makes the creditor's position precarious. To sue the debtor state on a public loan, therefore, is practically useless. There are some states whose national courts might grant a creditor relief. These are the states that are never sued on their national debts.

To sue the debtor state before the courts of the creditor is still less practicable. As a general rule municipal courts decline to take jurisdiction over foreign states as defendants.² The exception of voluntary

¹ Lewandowski, Maurice, *De la protection des capitaux empruntés en France par les Etats étrangers*, Paris, 1896, 24 *et seq.* While apparently accepted as a principle, the theory is by no means undisputed that a state contracts a public loan in its character as a sovereign, *jure imperii*, and is not bound contractually to its creditors. See Moulin, H. A., *La doctrine de Drago*, Paris, 1908, 76 *et seq.*; Freund, *Rechtsverhältnisse*, etc., 59-61; speech of M. Ruy Barbosa (July 23, 1907) at the Hague Conference of 1907, *Actes et Discours de M. Ruy Barbosa*, 60 *et seq.*; see also the recent case of *De Andrade v. the government of Brazil*, reported in 40 *Clunet* (1913), 237.

² Bynkershoek is the father of this theory.

Loening, E., *Die Gerichtsbarkeit über fremde Staaten u Souveräne*, Halle, 1903 is one of the leading works on the subject. The opinions of courts are discussed, p. 23 *et seq.*; the opinions of writers, p. 55 *et seq.*; Christian Meurer, *Klagen von Privatpersonen gegen auswärtige Staaten*, 8 *Ztschr. f. Völkerrecht* (1914), 1-47, and *supra*, § 72. See also Brie, Fischer & Fleischmann, *Zwangsvollstreckung gegen fremde Staaten u Kompetenzkonflikt*, Breslau, 1910, containing three opinions rendered at the request of Russia in the case of *Hellfeld v. Russia* on the question of the jurisdiction of German courts over funds of Russia in Germany and the possibility of execution against them. The translation of the decision of the German court for the determination of jurisdictional conflicts in the now famous *Hellfeld* case may be found in 5 *A. J. I. L.* (1911), 490-519.

See on the whole subject an able article by Droop in 26 *Gruchot's Beiträge zur Erläuterung des deutschen Rechts*, 289-316, in which the decisions of courts are carefully reviewed. Some writers have made a distinction as to jurisdiction over foreign states, depending upon whether the transaction in question involved the defendant state in its capacity as a sovereign (*jure imperii*) or as a fiscus (*jure gestionis*), granting immunity from jurisdiction in the former case, but asserting it in the latter. The most noteworthy of these writers are Laurent, *Droit civil international*, Paris,

submission and questions concerning real estate are hardly of practical significance for the present case.

The French courts take the firm position that bondholders of the debt of a foreign state cannot sue before the French courts.¹ The English courts have usually declined to exercise jurisdiction over foreign states, and in the case of bondholders of foreign debts have unequivocally declared themselves jurisdictionally incompetent.² This is the rule of the German and Austrian courts³ and has been the uniform rule in courts of the United States.⁴ In Belgium and Italy the courts seem to have adopted the distinction of administrative law between transactions of the state undertaken *jure imperii* and *jure gestionis*, and to have exercised jurisdiction in the latter case.⁵

If there were still any doubt as to the impracticability of relief by suit against a foreign government in municipal courts, it would be dispelled by the certainty that execution of the judgment, even if obtainable, is practically impossible. No legal process lies against the property of a foreign state, and even the jurisdictional distinction made by some courts between acts *jure imperii* and *jure gestionis* is disregarded in the matter of execution. The exception of actions involving real estate does not concern us here. Even attachment and garnishment proceedings against the movable property of foreign sovereigns are almost uniformly dismissed.⁶

1880, III, 42-103, and von Bar, *op. cit.*, 1101 *et seq.* They have been followed by a number of courts, notably those of Belgium and Italy. *Supra*, p. 176.

¹ See the cases cited in Weiss, A., *Traité de droit international privé*, V, 94; Loening, *op. cit.*, 45.

² Westlake, J., *A treatise on private international law*, London, 1905, 4th ed., §§ 190, 192 and cases there cited. See particularly *Twycross v. Dreyfus* (1877), 36 *Law Times Rep.* (N. S.) 755, 757, decision of Jessel, M. R.

³ Citations of cases in Brie, *op. cit.*, and Loening, *op. cit.*, 23 *et seq.*

⁴ Moore, J. B., in his *American notes to Dicey, A. V., A digest of the laws of England with reference to the conflict of laws*, London, 1896, p. 229. See leading case of *Schooner Exchange v. McFaddon* (1812), 7 *Cranch*, 116; 30 *Cyc.* 104, and cases there cited.

⁵ Cases cited in Loening, *op. cit.*, 52-54.

⁶ Brie, *op. cit.*, 45 *et seq.*; Loening, *op. cit.*, 139 *et seq.* See the cases of *von Hellfeld v. Russia*, *supra*; *De Reilhac*, *Trib. civil de la Seine*, June 12, 1895, 40 *Chunet* (1913), 907, and *Mason v. Intercolonial Railway of Canada* (1908), 197 *Mass.* 349. See article by Nathan Wolfman, "Sovereigns as defendants," in 4 *A. J. I. L.* (1910),

It is thus apparent that national municipal courts, either of the debtor state or of the country of the creditor, are unable to secure the unpaid creditor any remedy. He is not left helpless, however. The sanction for a violation of his rights is found in international law and practice, in that states have frequently interfered in behalf of their creditor subjects to secure the payment of unfulfilled national obligations of foreign states. Before examining the legitimacy of diplomatic interposition and intervention for such unpaid creditors, let us inquire into the nature of the transaction by which a citizen becomes a holder of a share in the public debt of a foreign nation.

§ 119. International Remedies. The Drago Doctrine.

It has already been observed that the emission of a public loan takes place by legislative act. The individual abroad may obtain the bond either through a direct transaction with the government or through a banker who has underwritten the loan. As a general rule, however, the bonds are purchased in the open market as industrial securities would be, without any direct relation with the debtor government. Being payable to bearer, they pass from hand to hand, from national to national, by mere delivery.

Again, the price paid takes into account the value of the security, both intrinsically and as an investment. Thus the solvability of the government bears a direct relation to the price of its bonds. Weak and unstable governments must sell below par and pay high rates of interest. The original capitalist takes advantage of the necessities of the borrowing state and exacts discounts and interest accordingly, and subsequent dealers in the bonds know the conditions equally well. The legal fact that the emission was an act of sovereignty, that the debt may be repudiated or reduced by a similar act, that the usual civil remedies are barred, and that the state is the sole judge of its ability to pay, are known to all parties to the transaction. The investor therefore buys with full notice and assumption of the risks, and has weighed the probabilities of large profits against the danger of loss.

It is for these reasons that it seems unfair, both to the debtor state

373-383, in which a departure from the general rule is urged in favor of jurisdiction over property engaged in private or commercial undertakings.

and to the fellow nationals of the creditors (who may indeed change from day to day), that the government of the creditor should make the breach of such a contractual obligation to a citizen who accidentally holds a foreign public bond a cause for armed international action involving the whole nation in the burden, and making the government in effect the underwriter and guarantor of his investment in the securities of a foreign government.

This is the principal argument of the Drago Doctrine, first advanced in the celebrated note of December 29, 1902, from Dr. Luis Drago, Minister of Foreign Affairs of Argentina, to the Argentine Minister at Washington, and by him submitted to the Department of State, on the occasion of the joint intervention of Great Britain, Italy and Germany against Venezuela. The argument led up to the recommendation of proposed policy, intended to be a corollary to the Monroe Doctrine, that "the public debt [of an American state] cannot occasion armed intervention, nor even the actual occupation of the territory of American nations by a European power."¹

It may be noted that Drago protests only against the use of armed force in the collection of public debts and not directly against diplomatic interposition. Most of the writers who have discussed the question have failed to note this distinction, possibly because a denial of forcible measures deprives interposition of its most effective sanction.

¹ The text of the Drago note will be found in *Foreign Relations* 1903, 1-5. Dr. Drago has written the following monographs on the doctrine which has been named after him: *Cobro coercitivo de deudas publicas*, Buenos Aires, 1906; *Les emprunts d'Etat et leurs rapports avec la politique internationale*, 14 R. G. D. I. P. 251, translated practically in full in his article "State loans in their relation to international policy," in 1 A. J. I. L. (1907), 692-726. Among the best literature in English are two thoughtful articles by George Winfield Scott, "International law and the Drago doctrine" in *North American Review*, Oct., 1906, 602-610, and "Hague convention restricting the use of force to recover contract claims" in 2 A. J. I. L. (1908), 78-94; an article by Amos S. Hershey, *The Calvo and Drago doctrines*, in 1 A. J. I. L. (1907), 26-45; and Chapter VIII, vol. 1, pp. 386-422, of James Brown Scott's *The Hague Peace conferences of 1899 and 1907*, Baltimore, 1909. One of the best books is Moulin's *La doctrine de Drago*, Paris, 1908, and a useful collection of documents is to be found in S. Perez Triana, *La doctrina Drago*, Londres, 1908. Alvarez in 3 A. J. I. L. (1909), 335 contests Moulin's view that the Drago doctrine is a necessary complement of the Monroe doctrine. Further references to foreign literature may be found in Bonfils, *Manuel* (6th ed., 1912), 186, n. 4. See also a recent work by Vivot, A. N., *La doctrina Drago*, Buenos Aires, 1911.

They therefore consider the protest against the sanction as directed against the whole remedy, although even without the potential use of force it still has some room for application. In expressly stating that he did not intend to make his "doctrine" a defense "for bad faith, disorder, and deliberate and voluntary insolvency," Dr. Drago has, it is believed, set the proper bounds to his principle, although, as will be pointed out, the creditor state is still (except as restrained by the Porter proposition) left the sole judge of the existence of these limiting conditions.

§ 120. Diplomatic Interposition and Intervention. Opinions of Publicists.

Before proceeding further, it may be appropriate to discuss briefly the opinions of publicists and the practice of nations in the matter of intervention to collect public debts, by which is meant diplomatic interposition followed by force. Westlake, as has been observed (*supra*, p. 283), has properly recognized the distinction in substance and in remedial process between contracts made with the state in its character as a fiscus or business administrator and those arising out of subscription to or transfer of a public bond. He regards honest inability to pay as a title to consideration, and unless the defaulting government presumes to treat its internal and external debts on terms of inequality unfavorable to the latter, he thinks "the assistance of their state ought not to be granted to the bondholders of public loans."

Some of the earlier writers, prominent among them Grotius and Vattel, admitted the legitimacy of reprisals against a sovereign who refused to pay a lawful debt (*supra*, p. 286). Inability and refusal to pay are not, however, identical. Phillimore and Hall, supporting the views of the British government, contend that a debt contracted by a foreign government toward a citizen constitutes an obligation of which the country of the lender *has a right* to require and enforce the fulfillment.¹ Yet Phillimore approves, as he says, the proposition of Martens that, in the absence of flagrant misconduct, the foreigner can only

¹ Phillimore, 3rd ed., II, ch. III, 8 *et seq.*; Hall, 6th ed., 275-276. See also Pomeroy, *Int. law* (Woolsey's ed.), Boston, 1886, §§ 213, 214, and Lorimer, *Institutes*, Edinburgh, 1883, I, 447-448, who would hold a borrowing nation at least to good faith.

claim to be put on the same footing as the native creditor of the state.”¹ Rivier, one of the foremost authorities, has in this respect asserted a far-reaching right of intervention under circumstances far more unreasonable than those admitted by other publicists. Unless it may be assumed that the words italicized below presuppose fraud and bad faith, his doctrine will hardly find general support, though it must be admitted that the weaker states have at times found themselves intervened against under circumstances no harsher than those mentioned by Rivier:

“The fortune of individuals, subjects of the state, forms an element of the riches and prosperity of the state itself. It has an interest in the maintenance and increase of that fortune. If it is compromised by the act of a foreign state *which administers its finances badly, which betrays the confidence individuals placed in it when they subscribed to loans on conditions that are not observed, and which violates its engagements in regard to them*, the state to which the injured individuals belong is evidently authorized to take their interests in hand in any manner which it shall deem suitable; it may proceed either by diplomacy or by reprisals. . . . Individuals have not, as a general rule, the right to require of the state that it shall thus take their cause in hand. The state may refuse to act in their favor for reasons of which it is the sole judge; but if it acts, it only exercises its right. It may see to it, perchance, according to the circumstances, that its subjects are better treated than those of other states, or than those of the insolvent state. This is, from the legal point of view, a matter of absolute indifference.”²

G. F. de Martens sanctions intervention in case of “violent financial operations” of the debtor state depriving creditors of their loans, but he adds that foreign creditors cannot demand better treatment than nationals.³ Although cited by Phillimore as an advocate of in-

¹ Phillimore, *op. cit.*, II, 14.

² Rivier, Alphonse, *Principes du droit des gens*, Paris, 1896, I, 272.

³ This was in effect the decision of the Hague Tribunal in the claim of Canevaro (Italy) *v.* Peru, April 25, 1910, 6 A. J. I. L. (1912), 746, based on the fact that certain bonds of the internal debt of Peru, subsequently reduced in value by the refunding of that debt into consolidated bonds, had by assignment passed into the hands of Italian subjects, who had sustained injury by the reduction of the debt. Although Italy cited numerous authorities in support of its argument that as to aliens a state incurs international responsibility by the reduction of its debt, the Tribunal declined to view the refunding as the reduction of a foreign debt, but considered the transfer of the bonds of an internal debt from nationals to aliens as not conferring greater rights upon aliens than nationals possessed. See an illuminating article by Ch. de Boeck, discussing the Peruvian and Italian contentions, with citations of authorities, in 20 R. G. D. I. P. (1913), 355 *et seq.*, 365, 369.

tervention, opponents may also find support in his ambiguous doctrines.¹

The majority of writers consider armed intervention for the mere non-payment of public debts an unjustifiable procedure, upon reasons similar to those advanced by Dr. Drago, namely: that hazardous loans should be discouraged; that those making them have full notice of the risks; that foreigners cannot expect to be preferred to native creditors; that force is never resorted to except against weak states and is often a pretext for aggression or conquest; and, finally, that the loss of credit and standing incurred by the state is an ample and effective penalty for the failure to fulfill its obligations.² The objections of writers, however, are directed not to diplomatic interposition, but rather to an *excess* of interposition in the use of armed force to collect unpaid public loans.

The preponderance of authority, however, favors the view that under certain circumstances intervention to secure the payment of public loans is legitimate. Authorities differ merely as to the nature of the circumstances. In general, it may be said that intervention is not warranted in the case of an honest inability of a state to pay its debts, but only when, the means being at hand, the debtor state willfully refuses to pay; or further, when foreign creditors are illegally treated, especially if they are discriminated against in favor of national creditors, or if certain categories of creditors are preferred to others; or when special funds assigned as security to the payment of certain debts are diverted or suppressed;—in short, when *bad faith* may be considered the moving cause

¹ G. F. de Martens, *Précis du droit des gens*, Paris, 1864, I, 298, § 110. See also Phillimore, *op. cit.*, 14, and Pradier-Fodéré, *Traité*, I, § 405, p. 623, note.

² These authorities are enumerated and citations to their works given in the second part of footnote 34 of Hershey's article in 1 A. J. I. L. (1907), 37; in the work of Wuarin, *op. cit.*, 155–159, and in the address of Gen. Horace Porter before the Second Hague Conference on July 16, 1907, presenting the American proposition for the limitation of force in the collection of contractual debts. La deuxième Conférence internationale de la Paix, II, 229–233. Also printed in English (Hague, 1907). The principal publicists who oppose what may be called financial intervention are F. de Martens, Westlake, Holland, Bonfils, Calvo, Pradier-Fodéré, Rolin-Jacquemyns, Despagnet, von Bar, Liszt, Geffcken, Kebedgy, Nys, Merignhac, Féraud-Giraud, Weiss, Olivecrona and Floecker. Gen. Porter also cited Rivier, but this must have been an oversight. See also Collas, *Der Staatsbankerott und seine Abwicklung*, Stuttgart, 1904, 51, and Freund, *Rechtsverhältnisse*, etc., 271.

of the non-payment. In the present condition of international law, in which states, large and small, have no common superior to control or check them, each state has the legal right of deciding for itself whether the conditions warranting intervention exist. In the use of this right, the power of enforcing its demands has often been a factor more controlling than the mere legitimacy or fairness of its action.¹

There is, in fact, no definite rule as to diplomatic intervention in the matter of unpaid public loans, except in so far as the convention of the Second Hague Conference for the limitation of the use of force in the collection of contractual debts will operate as a check by requiring under certain conditions a preliminary resort to arbitration.

§ 121. Practice of Nations.

The European powers have on several occasions intervened to secure the payment of public loans due their subjects. Their action has taken various forms. Sometimes it has been merely the use of good offices and an approval of arrangements for financial control made by national bankers or associations of bondholders with the debtor state, as in the case of Turkey (1881) and Servia (1904); an assumption of limited governmental control, as in the case of the United States in the Dominican Republic (1907); or joint intervention of several powers assuming financial control as in the case of Tunis (1868), of Greece² (1897), and

¹ The decision of the Hague Permanent Court of Arbitration in the Preferential Claims case of Germany, Great Britain and Italy against Venezuela has been considered an approval of the use of force in the collection of claims based on contract or public debt. While it is true that the use of force appears to have been sanctioned by the tribunal by the allowance of preferential treatment to the three blockading powers, it is certain that only a small part of the claims pressed arose out of contractual debts. The primary reason of the blockade was the stubborn reiteration by Venezuela of the exclusive jurisdiction of its national courts and the absolute refusal to arbitrate. Castro's arrogance exhausted the patience and temper of the powers. See article by Basdevant, Jules, *L'action coercitive Anglo-Germano-Italienne contre le Venezuela* (1902-1903), 11 R. G. D. I. P. (1904), 363-458; Hershey, Amos S., *The Venezuelan affair in the light of international law*, 51 American Law Register, 249-267. The Hague decision is criticised by André Mallarmé in an article *L'arbitrage vénézuélien* in 13 R. G. D. I. P. (1906), 423-500. For the correspondence see *Asuntos Internacionales*, two volumes of the Yellow Book of Venezuela published in 1903 and extracts printed in the Appendix to Ralston's Report of the Venezuelan Arbitrations.

² Kebedgy, Michel S., *Les difficultés financières de la Grèce et l'intervention des*

of Egypt (1880).¹ This is intervention in the true sense, in that it involves an administrative control over a certain portion of national resources and revenues. It seems to be more proper on the part of a state or states guaranteeing the debt of some weak state placed under their guardianship. Both this form of action and the collection of loans by force of arms without complete intervention, as, *e. g.*, the joint operations against Mexico in 1861 and against Venezuela in 1902, have invariably been carried out against weak states. When Spain, Italy, Austria, Hungary and various states of the United States at different times suspended or reduced their public obligations there was no intervention on the part of the powers whose subjects had shares in the unpaid or underpaid loans. This is at least cumulative evidence in establishing that intervention or the use of arms to collect public loans is a question of power and politics rather than a rule of law.

Notwithstanding Great Britain's participation in the operations against Mexico in 1861, against Egypt in 1880, and against Venezuela in 1902, her statesmen have always asserted it to be England's policy not to interpose diplomatically in behalf of British holders of bonds of foreign governments, though reserving their liberty of action. The British view was expressed in its now accepted form in the celebrated circular sent by Lord Palmerston in 1848 to the British representatives in foreign states. He then declared:

"It is therefore simply a question of discretion with the British government whether this matter [the non-payment of public loans] should or should not be taken up by diplomatic negotiation, and the decision of that question of discretion turns entirely upon British and domestic considerations."

états étrangers, 1 R. G. D. I. P. (1894), 261-271; Imbert, Henri Marc, *Les emprunts d'états étrangers*, Paris, 1905, gives an account of the various cases of intervention in Turkey, Egypt, Portugal, Greece, Tunis (pp. 60-99); Kebedgy, M. S., *De la protection des créanciers d'un Etat étranger*, 21 Clunet (1894), 59-72, 504-519. See also Wuarin, Freund and Politis, *op. cit.*, and Meili, Fr. *Der Staatsbankerott und die moderne Rechtswissenschaft*, Berlin, 1895; Waurin, article in 29 Clunet (1902), 25 *et seq.*, 420-431.

¹ Kaufmann, Wilhelm, *Das internationale Recht der ägyptischen Staatschuld*, Berlin, 1891. See also article by same author in 22 R. D. I. (1890), 556-586; vol. 23, 48-75, 144-175, 266-316. A bibliography on the Egyptian debt will be found in 30 Clunet (1903), 681-683.

Referring to the economic disapproval of British investments in foreign loans as against British enterprises, he added that the British government has

"hitherto thought it the best policy to abstain from taking up as international questions the complaints made by British subjects against foreign governments which have failed to make good their engagements in regard to such pecuniary transactions. . . ."

"But, nevertheless, it might happen that the loss occasioned to British subjects by the non-payment of interests upon loans made by them to foreign governments might become so great that it would be too high a price for the nation to pay for such a warning as to the future, and in such a state of things it might become the duty of the British government to make these matters the subject of diplomatic negotiations."¹

Palmerston's instruction has occasionally been misinterpreted by writers who use his note in support of an argument for non-intervention. When he stated that interference was "for the British government entirely a question of discretion, and by no means a question of international right," he did not intend to cast any doubt on the *right* of Great Britain to interfere (as some writers have quoted him), but he meant that there was *no question* about the right to interfere. This is clearly shown by the succeeding sentence of the note.²

Subsequent secretaries for foreign affairs, emphasizing the speculative character of the transaction of subscription to a foreign loan, have declined to do more than exercise their good offices in behalf of unpaid bondholders. Great Britain's practice of non-interference is entirely a matter of policy and is not to be construed as the recognition of an international legal principle.³

¹ Palmerston's circular is quoted in full by Phillimore, *op. cit.*, II, 9-11, and by Hall, 276-277. Other secretaries for foreign affairs of Great Britain have expressed, in language even more unreserved than that of Palmerston, the policy of non-interference. See, for example, Canning and Aberdeen (28 St. Pap. 961, 967, 969). Russell (52 St. Pap. 237-239), Derby, Granville (quoted by Phillimore, *op. cit.*, 12-13), and Salisbury (cited by Hall, note, p. 277). Balfour, when Prime Minister in 1902, supported this view; see Scott's Hague Peace Conferences, I, 402.

² See, for example, Gen. Porter's address of July 16, 1907, printed separately and quoted in Scott's Hague Peace Conferences, I, 402.

³ The recent (1913) threat of Great Britain to dispatch a warship to Guatemala to collect the unpaid interest and capital on bonds held by British subjects may be charged to the action of Guatemala in diverting the security of the loan, an export tax on coffee, to other purposes.

The practice of non-interference of the United States on the other hand has been not only a matter of policy, but the carrying out of a fundamental principle that the diplomatic interposition of the United States cannot be invoked (within the recognized limitations) in behalf of contractual claims.¹ If certain revenue or security has been set aside for the repayment of a loan, it seems probable that the United States would, following the practice of other nations, interpose diplomatically to prevent any diversion of the security or the pledged revenue.² Attorney-General Cushing in the course of an elaborate opinion on the Texas bonds question declared that

"A public creditor, like a private creditor, has a general right to receive payment out of the property, income, or means of his debtor. A special pledge of this or that source of revenue, of this or that direct tax, when made by a government, renders such source of revenue, like a mortgage or deed of trust given by a private individual to his creditor, a specific lien, a fixed incumbrance, which the government ought not, in justice to the creditor, to abolish, lessen, or alienate until the debt has been satisfied."³

In the case of certain bonds issued by Haiti to American citizens for work and materials furnished, Secretary of State Sherman protested against a proposed law of Haiti having in view the conversion of the bonds at a rate greatly depreciatory of their value.⁴ There would indeed seem to be some difference between bonds purchased in the open market as an investment and bonds received in payment for services and goods, in the hands of the original parties.

Where the loan has been liquidated and a new agreement for payment made, the origin of the debt seems to have constituted no deterrent against its enforcement. So in Mexico, in 1861, Lord John Russell withheld recognition of the Mexican government until Mexico had agreed to carry out an arrangement made with British bondholders.⁵

¹ Citations noted in Moore and Wharton, *supra*, p. 288.

² Cases cited, *supra*. See also opinion of Little, commissioner, in *Aspinwall* (U. S.) *v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3641-3642.

³ Opinion of Sept. 26, 1853, 6 Opin. Atty. Gen. 130, 143.

⁴ Mr. Sherman, Sec'y of State, to Mr. Powell, Oct. 26, 1897, Moore's Dig. VI, 729. In *Canevaro (Italy) v. Peru*, April 25, 1910, 6 A. J. I. L. 746, the *internal* debt of Peru was converted at a reduced rate.

⁵ Lord J. Russell to Sir C. Wyke, Mar. 30, 1861, 52 St. Pap. 237, 239. Some of

Both the United States and Great Britain have authorized their representatives abroad to receive payment for their citizen bondholders, as a matter of convenience both to the debtor government and to the citizen,¹ and where the bonds of one foreign government have been wholly or largely held by the citizens of another, the United States has, on one occasion at least, sanctioned the endeavor of the government of the creditors to effect by diplomatic negotiation an adjustment of their claim.²

Dr. Drago, in advancing his doctrine as a corollary to the Monroe Doctrine, had some reason to expect the approval of the United States, not only because of its interest in the maintenance of the Monroe Doctrine, but because of its traditional attitude in the matter of contract claims. Dr. Drago quoted from Monroe's message that the United States

"could not view any interposition for the purpose of oppressing [the countries of the American continent], or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly spirit toward the United States."³

In Secretary of State Hay's reply to the Drago note (one of "cordial evasion," as Dr. Drago himself has expressed it), Mr. Hay quoted from President Roosevelt's message of 1901 to the effect that

"we do not guarantee any state against punishment if it misconducts

the money was seized by Mexican authorities after it was in the hands of the bondholders' agent. This raised a different question, and of course justified interposition. 51 St. Pap. 548.

¹ Mr. Frelinghuysen, Sec'y of State, to Mr. Wright, Jan. 17, 1884, Moore's Dig. VI, 713; Phillimore, *op. cit.*, II, 13. See also settlement of claim of McMaster (Gt. Brit.) v. Colombia, Jan. 27, 1882, 73 St. Pap. 1349. McMaster had to prove that he purchased the 16 bonds in question before the issuance of a certain order for the suspension of payment on all bonds of this issue. Claimant governments will usually examine closely into the *bona fides* of the transaction by which their citizens became the holders of the bonds of foreign governments, to establish the absence of speculative ventures, and the existence of an actual loss. The face value of the bonds is not always a good test of the sum parted with or the legitimate loss sustained.

² Mr. Frelinghuysen, Sec'y of State, to Mr. Wright, Jan. 17, 1884, Moore's Dig. VI, 713. He stated, however, that the occasions on which this had been done were not common enough to form a rule of action.

³ President Monroe's Annual Message, Dec. 2, 1823, Amer. St. Pap., For. Rel. V, 246, 250, quoted in Moore's Dig. VI, 401, 402; Richardson's Messages, II, 209 *et seq.*

itself, provided that punishment does not take the form of the acquisition of territory by any non-American power,"¹

but added an unequivocal approval of arbitration of claims growing out of alleged wrongs to individuals.

§ 122. The Porter Proposition at The Hague.

Both Mr. Root, as Secretary of State, and President Roosevelt, having in mind the difficulties of Venezuela in 1903 and those of the Dominican Republic in 1894 and 1904 in endeavoring to ward off foreign intervention, were anxious to have the question of the use of force in the collection of contractual claims settled by the agreement of states. Mr. Root therefore on June 18, 1906, instructed the delegates of the United States to the Third American Conference of American States at Rio Janeiro as follows:

"It has long been the established policy of the United States not to use its armed forces for the collection of ordinary contract debts due to its citizens by other governments."

After deprecating its injurious effect upon the welfare of weak and disordered states, whose development ought to be encouraged in the interests of civilization, he added:

"It is doubtless true that the non-payment of public debts may be accompanied by such circumstances of fraud and wrong-doing or violation of treaties as to justify the use of force. This government would be glad to see an international consideration of the subject which shall discriminate between such cases and the simple non-performance of a contract with a private person, and a resolution in favor of reliance upon peaceful means in cases of the latter class."²

He recommended, however, that as most of the American states were still debtors and would, by such a resolution, resolve how their creditors should act, it would be more fitting that they should request the Hague Conference, where both creditors and debtors would be assembled, to consider the subject.

The Rio Conference made such a request, and the United States delegation at The Hague, on instructions from Mr. Root, as Secretary

¹ Mr. Hay, Sec'y of State, to Señor Garcia Mérou, Feb. 17, 1903, For. Rel., 1903, 5-6.

² Senate Doc. 365, 59th Cong., 2nd sess., 41-42.

of State, brought forward a proposition to the effect that the use of force for the collection of contract debts is not permissible until after the justice and amount of the debt, as well as the time and manner of payment, shall have been determined by arbitration.¹

Gen. Horace Porter took charge of this proposition, and made the principal address in its support. After several amendments to his original draft, the conference by a vote of 39 in favor and 5 abstentions (Belgium, Roumania, Sweden, Switzerland and Venezuela) adopted the following convention—a few states making special reservations:

“The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals.

“This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award.”

While not rejecting completely the possibility of forcibly collecting contract debts, the convention represents a considerable step in advance, inasmuch as it makes the use of force conditional upon (1) a refusal to arbitrate; (2) making a formulation of an agreement impossible after arbitration is accepted; (3) failure to carry out the award. These are more definite and more appropriate limitations than the vague terms “bad faith,” “deliberate and voluntary insolvency,” etc., which we may infer even the opponents of intervention and Dr. Drago himself would consider as justifiable causes of intervention.²

A few countries either declined to subscribe to the convention or

¹ In the Russian program of the First Peace Conference of 1899 regarding international arbitration a clause had been included providing that arbitration shall be obligatory “in the case of differences or conflicts regarding pecuniary damages suffered by a state or its citizens in consequence of illegal or negligent action on the part of any state or the citizens of the latter.” This proposition for the arbitration of pecuniary claims was for various reasons dropped.

² A good account of the preliminary instructions and principal speeches and proposals in connection with this convention for the limitation of the employment of force, with appropriate quotations, may be found in J. B. Scott's *Hague Peace Conferences*, I, Chap. VIII, 386–422. See also article by G. W. Scott, *supra*, in 2 A. J. I. L. (1908), 78–94. The convention in full is printed in Scott's *Hague Peace Conferences*, II (Documents), 357–361.

in adhering registered important reservations. Switzerland and Venezuela declined to sign the convention (although the latter was very willing to accept the renunciation of force) on the ground that it ousted the national courts of jurisdiction. One can understand Switzerland's unwillingness to be bound to arbitrate a question in which its courts, internationally recognized as impartial, have jurisdiction.¹ Venezuela's protest, which took the following form—

“recourse to arbitration should be permitted only in the case of denial of justice after the judicial remedies of the debtor state had been exhausted”—

is to be regarded as traditional. If its judicial organization is as independent as it ought to be, the justification for the protest is readily apparent. Seven other Latin-American republics, by way of reservation, joined in the objection of Venezuela.

The principal reservation was made by Dr. Drago himself, on the part of Argentine. After declaring that ordinary contracts should be arbitrable only in case of denial of justice after the exhaustion of local remedies, he added:

“Public loans with bond issues constituting the national debt cannot in any case give rise to military aggression nor to the occupation of the soil of American states.”

In this reservation Argentine was joined by Colombia, Ecuador, Guatemala, Nicaragua, Paraguay, Peru and Uruguay.²

Another reservation by Peru, in which Uruguay joined, sought to protect the so-called Calvo clause from possible infringement. The reservation reads:

“That the principles adopted in this proposition cannot be applied to claims or differences arising from contracts between the government of one country and foreign subjects, when it has been expressly stipu-

¹ In theory at least the strong and well-organized states have renounced an inherent right. Dr. Heinrich Pohl in the *Zeitschrift für Politik* (vol. 4, 134, 138) criticizes Germany for having ratified the Porter Proposition (*Reichsgesetzblatt*, 1910, 59–81), for he states that Germany may sometimes be a defendant state and will be bound by the agreement to arbitrate, thus ousting its courts of jurisdiction.

² See table of reservations in J. B. Scott's *Hague Peace Conferences*, II, 532–534, and article by G. W. Scott, 2 A. J. I. L. 89. See also 3 *Zeitschr. für Völkerr. u. Bundesstaatsrecht*, 72, 73.

lated that the claims or differences must be submitted to the judges and tribunals of the contracting country."

The general futility of this clause in so far as it seeks to attain the exclusive jurisdiction of local courts and the avoidance of diplomatic interposition, has been demonstrated by international practice.

One possible objection to the Porter proposition, which appears to have escaped general attention, lies in the fact that it actually sanctions the use of armed force in a class of cases in which the United States, and, on occasion, other powers, have declined, as a matter of policy, to intervene diplomatically.

§ 123. Relation Between Porter Proposition and Drago Doctrine.

It will be seen that this Hague convention for the limitation of the use of force in the collection of contractual debts, popularly known as the Porter proposition, is at once narrower and wider in scope than the Drago doctrine. It is *narrower* inasmuch as it recognizes the ultimate legality of the use of force. As a definite check upon the use of force in first instance, and an important extension of the principle of international arbitration, it is to be welcomed, for pacific blockades, threats of hostilities, and rumors of warlike preparations, have a most disturbing effect on international commerce, and as General Porter showed, the disposition of neutral states to refuse to recognize pacific blockade leads to the more effective blockade of actual war, and as Mr. Roosevelt on a number of occasions has stated, the seizure of custom houses easily leads to a more permanent occupation of territory.

Moreover, the interruption of the commerce of the debtor nation diminishes its means and opportunities to pay the very debts for which the hostilities are undertaken and acts unfairly toward creditors of other nations. Many of these difficulties will now be avoided.

The Porter proposition is *wider* in scope than the Drago doctrine in that its provisions apply to all contractual debts, whereas Dr. Drago confined his policy to claims arising out of the non-payment of public loans. Nevertheless, doubt has been raised, both in the sub-committee of the Conference and since then, as to the meaning of "contractual debts."¹

¹ A full discussion of these doubts and possible interpretations is contained in Moulin, *op. cit.*, 308-320. See also article by G. W. Scott, 2 A. J. I. L. 90-93.

Without entering into the various interpretations to which the term is subject, it seems clear that it does include public loans.

There is a class of cases, however, of the "contractual" nature of which there may be some doubt. When a contract has been concluded between a government and an individual for the carrying on of some public work, it has happened that a subsequent act of the legislature, acting not as a business fiscus but as a sovereign, diminishes the contractor's rights under the contract. National courts, as, for example, the United States Court of Claims, have held that the two functions which the government possesses as a fiscus and as a sovereign are distinct, and that the United States when sued in the one character cannot be made liable for acts done in the other:

"Whatever acts the government may do, be they legislative or executive, so long as they be *public and general*, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons."¹

The question arises whether these distinctions of national law which exclude the case mentioned from the category of contractual debts will be maintained by the international forum in the interpretation of the term "contractual debts." It has been observed that Foreign Offices in dealing with the Latin-American Republics have on occasion considered it as a violation of the contract, and an arbitrary measure, thus to reduce the contractor's rights by a subsequent legislative act.² It seems reasonable to assume that this will be the interpretation of the term "contractual debt" by an international court.

§ 124. Public Bonds Before Arbitral Tribunals.

Bond cases have come before international tribunals on several

¹ *Deming v. United States*, 1 Ct. Cl. (1865), 190-191; *Jones and Brown v. United States*, 1 Ct. Cl. (1865), 384-399; *Wilson v. United States*, 11 Ct. Cl. (1875), 513-522; 28 Op. Atty. Gen. 123 (Wickersham), holding that the government might as a matter of grace and equity, relieve the contractor from unduly harsh burdens. French courts have held the government liable for breach of contract by an act of legislation.

² If the act of legislation is general, affecting equally all similar contracts between private individuals, it would seem that the U. S., by the decisions of its own courts, is constrained to decline interposition based upon alleged violation of law, but that it would be justified in exercising good offices in requesting relief for its citizen from unexpected burdens cast upon him by legislation.

occasions. Very little light is thrown upon the subject by the results of these arbitrations, except as by their *dicta* the commissions express the opinion that governments have the *right* to press the claims of bondholders of a foreign debt, though they generally admit that in practice such claims are not diplomatically presented. As a general rule, however, jurisdiction has been declined—usually for the reason that governments are not in the habit of presenting such claims diplomatically and because of the unwillingness of commissions to assume that they were intended to exercise jurisdiction in the absence of express words in the protocol.¹ It has been so held even where the protocol provided for the settlement of “all claims.”² The Colombian Bonds decision, rendered by Sir Frederick Bruce, Umpire, was severely criticised by Commissioner Little in the Aspinwall case before the United States-Venezuelan commission of December 5, 1885. He held, with Commissioner Findlay (Andrade dissenting), that the inclusive term “all claims” embraced bond claims. This case constitutes one important exception, prior to the Venezuelan Arbitrations of 1903, to the general rule that jurisdiction over bond claims is not exercised by international commissions.³

¹ Overdue Mexican coupons, *Du Pont de Nemours (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3616. Opinion by Wadsworth; Zamacona concurred. See *dictum* of Thornton, Umpire, in *Widman (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3467.

² Colombian Bond cases, *Riggs, Oliver, Fisher (U. S.) v. Colombia*, Feb. 10, 1864, Moore's Arb. 3612-3616. In the case of *Gibbes* before the 1857 and 1864 U. S.-Colombian commissions (Moore's Arb. 1398, 1410) an assigned bond was the subject-matter of the claim; the jurisdictional question does not appear to have been raised.

³ Venezuelan Bond cases, *Aspinwall, Executor of G. G. Howland et al. (U. S.), v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3616-3641. This claim was dismissed by the mixed commission under the convention of April 25, 1866. The findings of this commission were reopened because of the alleged fraud of the arbitrators. Under a strict construction of the protocol, Bates, Umpire, dismissed the Texas Bond cases before the British-U. S. Commission of Feb. 8, 1853, Moore's Arb. 3594. One reason was that they had not been treated by Great Britain as a subject for diplomatic interposition. The decision is criticised by Westlake, I, 77-78, citing Dana in Dana's Wheaton. § 30, n. 18. Jurisdiction was exercised by the Mexican commission of 1868 over a stolen bond, *Keller (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3065, on the ground of fraudulent destruction of specific property having a definite value and certain assurances by the government. See also *Eldredge (U. S.) v. Peru*, Jan. 12, 1863, Moore's Arb. 3462. The failure to fulfill the obligations of a bond issued for supplies was held not an “injury to property” by the U. S.-Mexican Commission of 1868 (*Manassé*

Before the Venezuelan commissions, sitting at Caracas, four bond claims were presented, with various decisions. In the case of the Comp. Générale des Eaux de Caracas (Belgium),¹ Venezuelan bonds payable to bearer had been issued to the corporation for certain public works. From the decision it would seem that the general rule of nonenforcement of bond claims may be held not applicable where the bonds are issued in payment of property rights transferred to the government. Although many of the stockholders were not Belgians, an award was made with the peculiar provision that the money should be deposited in a Belgian bank and the bonds paid on being turned in. The production of the bonds naturally was made a necessary condition for the making of an award, so where, in the case of Ballistini (France),² the original bonds were not produced, the claim was dismissed, Paul, Commissioner, in a *dictum* giving expression to the usual rule of the non-enforcement of bond claims before international commissions. In the case of Boccardo (Italy),³ where national bonds were delivered to claimant in payment for articles furnished and were never transferred by him, judgment was rendered on the authority of the Aspinwall case before the Venezuelan Commission of 1885. The fourth case, Jarvis (U. S.),⁴ was dismissed because the service and the supplies for which the bonds were issued (by a temporary dictator of Venezuela) were furnished to an unsuccessful revolution, which had not been recognized by the government of the United States, and hence presumably they were not valid obligations of Venezuela.

In the recent case of Canevaro (Italy) against Peru,⁵ Italy based its claim upon the fact that Peru had refunded its internal debt by issuing consolidated bonds at a greatly reduced rate, and that bonds of this internal debt held by Italian subjects by assignment were case, Moore's Arb. 3463), although the failure to pay for supplies furnished under contract had been so construed.

¹ Comp. Générale des Eaux de Caracas (Belgium) v. Venezuela, March 7, 1903, Ralston, 271-290.

² Ballistini (France) v. Venezuela, Feb. 27, 1903, Ralston, 503-506.

³ Boccardo (Italy) v. Venezuela, Feb. 13, 1903, cited in note to Ralston, 505 (not reported). See, however, the brief statement given by Mr. Ralston in his address before the International Law Association, 24th Rep. 193-194.

⁴ Jarvis (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 145-151.

⁵ Canevaro (Italy) v. Peru, April 25, 1910, 6 A. J. I. L. (1912), 746, 752.

thereby unlawfully reduced in value. The Hague Tribunal supported the contention of Peru that the internal debt did not become external by its assignment to aliens, and that alien transferee-holders were in no better position than national holders of the bonds. Various claims of French and other citizens and corporations against Chile, based upon bonded indebtedness guaranteed upon guano deposits ceded by Peru, were submitted to the tribunal sitting at Lausanne, the awards upon which were rendered July 5, 1901.¹ By the protocol of Feb. 2, 1914 between France and Peru, it was agreed to submit to arbitration the claim of the widow Philon-Bernal and other bondholders of the loan of 1870.²

§ 125. The United States and Central-American Loans.

The United States, in its endeavor to be consistent with the maintenance of the Monroe Doctrine and with the declaration of President Roosevelt that that doctrine could not be used by any nation of this continent to shield it from the consequences of its own misdeeds, has at times been placed in the most delicate position when foreign nations have attempted to seek redress for the alleged violation of international rights. So, in the settlement of numerous difficulties between European nations and Latin-American states arising out of pecuniary claims the United States has had an active interest. Especially where the occupation of American territory seemed imminent, the United States, by virtue of its responsibilities under the Monroe Doctrine, has felt called upon to undertake what may be called friendly intervention to prevent such occupation and yet satisfy the creditor nations.

President Roosevelt, in his message to Congress of Dec. 5, 1905, stated these embarrassing conditions, pointing out at the same time the method by which relief from this critical situation could be most equitably and practically secured. In his message he said:

“Our own government has always refused to enforce such contractual obligations on behalf of its citizens by an appeal to arms. It is much to be wished that all foreign governments would take the same view. But they do not, and in consequence we are liable at any time to be brought face to face with disagreeable alternatives. On the one hand,

¹ Descamps and Renault, *Rec. int. des traités du xx^e siècle*, 1901, p. 188 *et seq.*

² 41 Clunet (1914), 1440-1442.

this country would certainly decline to go to war to prevent a foreign government from collecting a just debt; on the other hand, it is very inadvisable to permit any foreign power to take possession, even temporarily, of the custom-houses of an American Republic in order to enforce the payment of its obligations, for such temporary occupation might turn into a permanent occupation. The only escape from these alternatives may at any time be that we must ourselves undertake to bring about some arrangement by which so much as possible of a just obligation shall be paid. It is far better that this country should put through such an arrangement rather than allow any foreign country to undertake it. To do so insures the defaulting republic from having to pay debts of an improper character under duress, while it also insures honest creditors of the republic from being passed by in the interest of dishonest or grasping creditors.”¹

This method of administering the finances of bankrupt and unstable governments has in fact been applied in the Dominican Republic. In 1905 it was effective in restraining the forcible attempt of Germany, Spain and Italy to secure payment of arrears of interest and pledged revenues to their subject creditors. International practice seems to have given a sanction to this form of intervention. It might be called benevolent intervention in the interests of the debtor state and of its creditors, and however the paternal control of the temporary guardian may hurt the pride of the citizens of the bankrupt nation, the advantages resulting to world peace exceed by far such minor disadvantages as the disapproval of a few patriotic nationals.² Nevertheless, in the absence of an international forum, it is not apparent how grossly exaggerated claims against these states can be avoided, for presumably the financial administration looks only to the payment of the current expenses and of the national debts and makes no provision for the judicial examination of the legitimacy of the latter. The existence of the Platt Amendment in the treaty with Cuba and in the proposed treaty with Nicaragua is an effective check upon the undue increase of public debts by these countries. The unratified treaties of 1911 between the United States and Honduras and the United States and

¹ For. Rel., 1905, H. Doc. 1, 59th Cong., 1st sess., 34-35.

² This Latin-American disapproval of the policy of the United States as evidenced in the unratified treaties of 1911 with Honduras and Nicaragua is expressed in a series of pamphlets: *United States and Latin-America, Dollar Diplomacy*, by Juan Leets, New Orleans, 1912; *Nicaraguan Affairs*, San José, 1912; *the Morgan-Honduras Loan*, 3 parts, New Orleans, 1911-12.

Nicaragua and the recently proposed "protectorate" treaty with Nicaragua, all of which were invited by these small republics, indicate a necessary policy of this government, whether by temporary receivership or supplementary administrative control, to secure the financial rehabilitation of the weaker states of Latin-America, and thus reassure foreign creditors and maintain domestic peace and prosperity on terms most favorable to Latin-America.¹

§ 126. Conclusion.

The Porter proposition is by no means a complete remedy for ex-

¹ European countries have adopted practices of various kinds to assure the successful operation of a loan contract concluded between a foreign nation and their subjects. Thus Great Britain has provided in such cases for the selection of a British supervisor of the loan and the government "takes cognizance" of the contract. The Corporation of Foreign Bondholders, an association for the protection of British holders of the bonds of foreign countries, usually seems to receive material support from the British government in its demands. Similar associations exist in Germany, France, and Belgium (41 *Clunet*, 1914, 137-140).

In the Dominican and the unratified Honduras and Nicaraguan treaties with the United States, diplomatic protection is extended to the receiver or supervisor in the performance of his duties. See the treaties between the United States and Dominican Republic, Feb. 7, 1907, Honduras, Jan. 26, 1911, and Nicaragua, June 8, 1911. See also editorial comment on the treaties in 5 *A. J. I. L.* (1911), 1046-1051. A discussion of the treaties by Sec'y of State Knox is contained in his speech before the New York State Bar Association (1912), 311-318. An elaborate explanation and justification of the policy of the United States in negotiating the treaties is to be found in President Roosevelt's message in connection with the customs revenues of the Dominican Republic, Confidential Executive, V, 58th Cong., 3rd sess. See also speeches incident to the visit of Philander C. Knox to the countries of the Caribbean, Feb. 23 to April 17, 1912 (Washington, 1913, ch. III and IV). France has apparently no objection to using its subjects' foreign loans to foster its commercial interests. Speech of M. Pichon, Minister of Foreign Affairs, in the Chamber of Deputies, Jan. 13, 1911, *Journal Officiel*, Jan. 14, 1911. Notwithstanding the disapproval by the present Administration of "dollar diplomacy"—an ill-defined and much-abused term—as evidenced in the withdrawal from the Chinese loan, the Administration has clearly indicated by the proposed so-called "protectorate" treaty with Nicaragua its necessary interest in the financial stability of the small Latin-American states. The recent threat of Great Britain to dispatch a warship to Guatemala to secure the payment of debts and the resulting appeal of Guatemala to the United States presents a familiar situation in our Latin-American relations. By reason of the Monroe Doctrine, we cannot avoid an active concern in the adjustment of these difficulties, and had better sanction a method of peaceful administrative supervision most conformable to the interests of all parties concerned.

isting evils, except in so far as it protects a debtor state from the *immediate* use of force. It still permits of much injustice to the debtor nation, inasmuch as claims are still presented on *ex parte* evidence without a judicial examination of the merits of the case. Experience has shown that claims are generally greatly exaggerated. Again, the creditor's national government is not required to arbitrate. The failure to make or accept the offer of arbitration simply precludes the use of force in first instance, but not the use of other methods of oppression. Experience has shown that it is only against weak states that governments will interpose to secure the payment of contract debts. Moreover, there is a question whether the debtor government can demand arbitration.¹ This should certainly be made possible.

On the other hand, the unpaid creditor has no individual right to bring about the adjustment of his claim. The action of his government in his behalf depends upon political considerations and is entirely a matter of expediency and policy. If his government for any reason declines to become interested in his case or to espouse his claim against the foreign government, the creditor is without a remedy. A legal right of the individual may therefore be sacrificed to the political exigencies of his government. With the constant growth of international contractual relations between individuals and foreign governments, the fulfillment and enforcement of legal obligations toward individuals should be divorced from political considerations. The difference in the practice of governments in the support of contract claims gives an unequal advantage to the nationals of some states and correspondingly embarrasses the governments whose policy or practice it is to decline diplomatic pressure in such cases.

These various defects of the system as it still exists, with its possibilities of injustice either to the debtor state or the unpaid creditor, or both, lend much weight to the proposal, advanced with greatest emphasis in Germany, that an international court be created by international agreement for the adjustment of these essentially legal claims. The individual should be given the right to bring suit against the debtor nation before this international tribunal, as has been done in the convention for the establishment of an international prize court and in

¹ O. Nippold in 18 Ztschr. für internationales privat. u. öffentliches Recht, 260.

the treaty of Washington for the establishment of a Central American Court of Arbitration. The creditor will thus be assured of a hearing, the debtor state will be secured against the pressure of exorbitant claims accompanied by disagreeable diplomatic coercion, the government of the claimant will avoid what is always a potential germ of international difficulty and ill-will, with the incidental expense of pressing a diplomatic claim, and the peace of the world will be fostered by the removal of one great source of international conflict. The details of the organization and operation of this international court may be left to the delegates of the Third Hague Peace Conference, who may profitably examine the proposals of several learned Germans.¹ The prospect and opportunity for thus advancing the cause of international justice, toward which goal the Porter proposition makes only a slight forward step, must command universal support.

¹ See the Denkschrift or memorial of the Ältesten der Kaufmannschaft von Berlin to the Imperial Chancellor, Sept. 30, 1910, reprinted in 20 Niemeyer's Zeitschrift für internationales Recht, 594-599, and the Denkschrift of May 20, 1912, summing up the whole matter, reprinted in Berliner Jahrbuch für Handel and Industrie, 497-514. See also the following works: Freund, G. S., *Der Schutz der Gläubiger*, Berlin, 1910, §§ 5, 43 *et seq.*; Wehberg, Hans, *Ein internationaler Gerichtshof für Privatklagen*, Berlin, 1911, in which plans for the organization and operation of an international tribunal are carefully worked out. See also Wehberg's article, *Die Durchsetzung von Privatansprüchen gegen Schuldnerstaaten*, in *Jahrbuch f. d. int. Rechtsverkehr*, 1912-13, 391-402, and an article in *Deutsche Wirtschafts-Zeitung*, 1912, 704-710, *Zur Errichtung eines internationalen Schiedsgerichtes für Streitigkeiten zwischen Privatpersonen und ausländischen Staaten*. See also Fischer, Otto, *Die Verfolgung vermögensrechtlicher Ansprüche gegen ausländische Staaten* (Leipzig, 1912) and references to the proposals of others mentioned on pp. 15-16; and a further note by Fischer in 43 *Ztschr. f. deutschen Zivilprozess*, 282-284, and works already cited Meili, *Staatsbankrott*, etc., 41, 50, 58, 59 and 63, and Pflug, 58-70.

CHAPTER VIII

INTERNATIONAL RESPONSIBILITY OF THE STATE—Continued. DENIAL OF JUSTICE

§ 127. Meaning of the Term.

In last analysis, a denial of justice is the fundamental basis of an international claim. It connotes some unlawful violation of the rights of an alien. The term, however, is used in two senses. In its broader acceptation it signifies any arbitrary or wrongful conduct on the part of any one of the three departments of government—executive, legislative or judicial. The term includes every positive or negative act of an authority of the government, not redressed by the judiciary, which denies to the alien that protection and lawful treatment to which he is duly entitled. Under the head of aliens, and in the preceding chapters on the responsibility of the state, we have discussed the question of the liability of the government for many of those injuries which may be inflicted on aliens in violation of municipal law, international law, treaties or the ordinary principles of civilized justice. These are denials of justice in the broader sense. For example, a wrongful expulsion, false imprisonment, confiscatory breach of contract, wanton pillage by officered government troops, confiscation of property by legislative act or executive decree, failure to punish a criminal offense, all constitute different forms of denial of justice.

In its narrower and more customary sense the term denotes some misconduct or inaction of the judicial branch of the government by which an alien is denied the benefits of due process of law. It involves, therefore, some violation of rights in the administration of justice, or a wrong perpetrated by the abuse of judicial process. It is in this sense that the term will be considered in the present discussion.¹

¹ The distinction between the broad and narrow meaning of denial of justice was considered in the case of *Fabiani (France) v. Venezuela*, Feb. 24, 1891, *Moore's Arb.* 4878, discussed by R. Floyd Clarke in 1 A. J. I. L. (1907), 389 *et seq.*

Some reference was made to denial of justice in the discussion of the responsibility of the state for the acts of judicial authorities, although it was there attempted to avoid any treatment of those specific violations of right or due process by the courts which have come to be known as denials of justice. For the present purpose, an undue delay of justice or manifestly unjust judgment may be considered as equivalent to a denial of justice.

Before undertaking any detailed discussion of the subject, it may be well to note that no definition of denial of justice as used in the broader sense is feasible. As was said by Secretary of State Gresham:

"The general ground of diplomatic intervention . . . in behalf of private persons is a denial of justice, and the question whether there has been, or is likely to be, such denial is one that can be determined only on the circumstances of each particular case as it may arise."¹

§ 128. Conditions Incident and Precedent to Diplomatic Interposition.

It is also important to note that the claimant government determines for itself whether a denial of justice warranting diplomatic interposition has taken place. In other words, not only is it frequently an uncertain standard to which a given violation of an alien's rights may be referred, but his own government (and not the local government) is the judge of the perpetration of a denial of justice by the state of residence. Thus Secretary of State Blaine aptly said:

"Where the question presented is whether the Government of a country has discharged its duty in rendering protection to the citizens of another nation," it cannot "be conceded that that government is to be the judge of its own conduct."²

And Secretary Fish in this connection remarked:

"Foreign governments have a right, and it is their duty, to judge whether their citizens have received the protection due to them pursuant to public law and treaties."³

In this fact lies the primary condition for the all too frequent abuse, by strong states, of the rights of weaker countries.

¹ Mr. Gresham, Sec'y of State, to Mr. Sheehan, Aug. 25, 1894, Moore's Dig. VI, 272.

² Mr. Blaine, Sec'y of State, to Mr. Dougherty, Jan. 5, 1891, Moore's Dig. VI, 805.

³ Mr. Fish, Sec'y of State, to Mr. Foster, Dec. 16, 1873, Moore's Dig. VI, 265. See also Mr. Bayard to Mr. Morgan, April 27, 1886, *ibid.* VI, 668.

On the other hand, it is to be noted that as a general rule the exhaustion of local remedies is considered a necessary condition precedent to recourse to diplomatic interposition. Only when these remedies have been exhausted, and a denial of justice established, does formal diplomatic espousal of a claim, as opposed to the use of good offices, become proper. Claimant governments dispense with the requirement of exhausting local remedies when those remedies appear insufficient, illusory or ineffective in securing adequate redress.¹ It may be noted, however, that before a denial of justice has actually been perpetrated, and while the case is still pending, foreign governments may use their good offices to see that their citizens abroad receive the benefits of due process of law, in order that a denial of justice may be avoided.

It has already been observed that the state is not responsible for the mistakes or errors of its courts,² especially when the decision has not been appealed to the court of last resort. Nor does a judgment involving a *bona fide* misinterpretation by the court of its municipal law entail, on principle, the international liability of the state. Only if the court has misapplied international law, or if the municipal law in question is in derogation of the international duties of the state, or if the court has willfully and in bad faith disregarded or misinterpreted its municipal law, does the state incur international liability. There is, however, no international obligation of the state to see to it that the decisions of its courts are intrinsically just.³ While in theory an unjust judgment reached by proper observance of the rules of international law and the forms of civilized justice does not render the state liable,⁴ it will be noticed hereafter that in practice the rule is not usually observed. An unjust judgment has on numerous occasions been regarded as not internationally binding, even in the

¹ The necessity to exhaust local remedies is for our purposes considered a limitation on diplomatic protection. The matter is discussed, *infra*, § 381 *et seq.*

² *Supra*, p. 195. See also Mr. Marcy to Baron de Kalb, July 20, 1855, 2 Wharton, 505, and Mr. Bayard to Mr. Morrow, Feb. 17, 1886, Moore's Dig. VI, 280. Mansfield's opinion in the Silesian loan case, cited by Randolph, Atty. Gen., in Pagan's case, 1 Op. Atty. Gen. 25, 32.

³ Anzilotti in 13 R. G. D. I. P. (1906), 22. See also Pomeroy (Woolsey's ed. 1886), § 205, to the effect that no state warrants the infallibility of its courts.

⁴ *Infra*, p. 340, note 5.

absence of any violation of due process of law or irregularity in procedure.¹

Excess of jurisdiction by the courts was held in the celebrated Costa Rica Packet arbitration to entail international responsibility, although Secretary of State Marcy in 1856 denied this rule.² The degree of responsibility incurred by the state through the misfeasance of its judges in their official or private capacities has already been considered.³

Before taking up specific examples of denial of justice, it may be well to recall certain fundamental general principles. The rule that those who resort to foreign countries are bound to submit to the local law as expounded by the judicial tribunals is disregarded only under exceptional circumstances, namely, when palpable injustice has been voluntarily committed by the courts.⁴ Secretary of State Bayard in 1886 remarked that "when application is made to [the] Department for redress for the supposed injurious actions of a foreign judicial tribunal, such application can only be sustained on one of two grounds:

"(1) Undue discrimination against the petitioner as a citizen of the United States in breach of treaty obligations, or

"(2) Violation of those rules for the maintenance of justice in judicial enquiries which are sanctioned by international law."⁵

The limitations implied in the latter principle must be clearly understood. They are intended to limit formal diplomatic interposition to cases in which the judicial proceedings have violated the universally recognized principles of civilized justice. For example, the system of criminal law in force in many countries is harsher than that applied in American courts; *e. g.*, the inquisitorial system prevails in many foreign countries, and trial by jury, habeas corpus and those many safeguards which our laws provide for the benefit of the accused

¹ *Infra*, p. 340.

² *Supra*, p. 196. See, however, the assertion of liability by Earl Granville, Sept. 30, 1881, 74 St. Pap. 1172, and account in Baty, 172-175.

³ *Supra*, § 52.

⁴ Mr. Forsyth, Sec'y of State, to Mr. Semple, Feb. 12, 1839, Moore's Dig. VI, 249.

⁵ Mr. Bayard, Sec'y of State, to Mr. Morrow, Feb. 17, 1886, *ibid.* VI, 280, 2 Wharton, 649. See also Grotius, III, ch. 2, § 5; Vattel, II, ch. 18, § 350; Pradier-Fodéré, § 403; G. F. de Martens, Précis, § 96; Baty, 163 *et seq.*, 172, 233; Phillimore, 3rd ed., II, 4.

are unknown.¹ Yet an American citizen who resorts to such a country is bound to submit to its laws and judicial system, and his own government is justified in intervening in his behalf only if the laws themselves, the methods provided for administering them, and the penalties prescribed are in derogation of the principles of civilized justice as universally recognized or if, in a specific case, they have been wrongfully subverted by the courts so as to discriminate against him as an alien or perpetrate a technical denial of justice.² Treaties usually stipulate that citizens of the contracting parties shall have free access to the courts and such other safeguards for the regular conduct of judicial proceedings and the proper administration of justice as is provided by the local law for natives. But apart from treaty obligation it is believed that aliens must be accorded appropriate judicial recourse for the due protection of their rights.

Even those states of Latin-America which seek to confine the diplomatic interposition of foreign governments on behalf of their citizens to its narrowest limits admit that a denial or undue delay of justice (after exhaustion of local remedies) is a valid ground for such intervention.³ A few states have attempted to narrow the scope of diplomatic interposition still further by providing a legislative definition of the term "denial of justice."⁴ The law of Salvador of September 29, 1886, for example, provides (art. 40) that

"It is to be understood that there is a denial of justice only when the judicial authority refuses to make a formal declaration upon the principal subject or upon any incident of the suit . . .; consequently, the fact that the judge may have pronounced a decision or sentence, in whatever sense it may be, although it may be said that the decision is

¹ *Supra*, p. 97. See Webster's report to the President in Thrasher's case, Dec. 23, 1851, 2 Wharton, 613; Mr. Marcy, Sec'y of State, to Mr. Jackson, Apr. 6, 1855, *ibid.* 614; Mr. Frelinghuysen, Sec'y of State, to Mr. Lowell, Apr. 25, 1882, For. Rel., 1882, 230. See also 2 Wharton, § 230 a.

² See, e. g., Mr. Marcy, Sec'y of State, to Mr. Fay, Nov. 16, 1855, Moore's Dig. VI, 655. Same to Mr. Jackson, Apr. 6, 1855, *ibid.* 275. Same to Mr. Starkweather, Aug. 24, 1855, *ibid.* 264.

³ *Infra*, p. 843.

⁴ Honduras, Law of April 10, 1895, art. 35, 87 St. Pap. 706; Salvador, Law of Sept. 29, 1886, arts. 39, 40 and 41, 77 St. Pap. 116-118, For. Rel., 1887, 69 *et seq.*; Guatemala, decree of Feb. 21, 1894, art. 42, 86 St. Pap. 1281 *et seq.* See *infra*, p. 846, and Moore's Dig. VI, 267 *et seq.*

iniquitous or given in express violation of law, cannot be alleged as a denial of justice.”

In other words, if a decision has been rendered, however iniquitous it may be, it would seem that a “denial of justice” may no longer be alleged. Secretary Bayard in declining to admit that Salvador could thus make the decisions of its courts internationally binding, added that while “it may be admitted as a general rule of international law that a denial of justice is a proper ground of diplomatic intervention, this . . . is merely the statement of a principle and leaves the question in each case whether there has been such denial to be determined by the application of the rules of international law.”¹

It is hardly to be supposed that any foreign state, even among those which have concluded treaties with Latin-American republics providing for a renunciation of diplomatic interposition in all cases except denial of justice, would consider itself bound by a municipal legislative interpretation of the term “denial of justice.” Diplomatic representations against these municipal laws have in fact been made.²

The action of a government in protecting its citizens abroad when their grievances appear capable of redress by judicial means, is in first instance confined to securing for them, usually by informal representations, free access to the local courts and an equality of treatment with natives.

It having been established that a state should not and generally does not interfere officially in the causes of its citizens brought before the local tribunals or in cases in which they are subject to the jurisdiction of the local law, except in the event of a denial of justice or notorious injustice, it becomes necessary to determine under what circumstances a denial of justice may be said to have occurred.

§ 129. “Denial of Justice” in International Practice.

Undoubtedly the absence of any impartial tribunal from which justice may be sought,³ the arbitrary control of the courts by the government,⁴

¹ Mr. Bayard to Mr. Hall, Nov. 29, 1886, For. Rel., 1887, 80-81.

² *Infra*, p. 847.

³ Mr. Cass, Sec’y of State, to Mr. Dimitry, March 3, 1860, 2 Wharton, 615. Mr. Bayard, Sec’y of State, to Mr. Buck, Nov. 1, 1886, Moore’s Dig. VI, 267. See also *infra*, § 383.

⁴ *Idler* (U. S.) v. Venezuela, Dec. 5, 1885, Moore’s Arb. 3517.

the inability or unwillingness of the courts to entertain and adjudicate upon the grievances of a foreigner,¹ or the use of the courts as instruments to oppress foreigners and deprive them of their just rights² may each and all be regarded as equivalent to a denial of justice, excusing a resort to local remedies and warranting diplomatic interposition. Justice may also be denied by studied delays and impediments in the proceedings, which in effect are equivalent to a refusal to do justice.³ These principles apply with equal force to administrative authorities acting in a judicial or quasi-judicial capacity.⁴

Justice may be denied in the course of judicial proceedings in ways too diverse to recount in detail. It may be profitable, however, to mention some of the cases in which a denial of justice has been held to exist by the government of an injured individual or by an arbitral commission. For this purpose we may discuss (1) the denial of justice arising prior to the trial or hearing of a case, including a wrongful failure by the authorities to have recourse to judicial proceedings; (2) various forms of denial of justice or notorious injustice in the course of the trial or of judicial proceedings; and (3) acts occurring after the trial, including a grossly unfair decision, which have been construed as a denial of justice.

Among the first class of acts, in which the denial of justice is predicated upon wrongs inflicted by governmental authorities prior to trial, in willful disregard of due process of law, may be mentioned the arbitrary annulment of concession contracts without recourse to judicial proceedings;⁵ the seizure or confiscation of property without legal process;⁶

¹ Phillimore, II, 4, cited by Mr. Bayard, Sec'y of State, to Mr. McLane, June 23, 1886, Moore's Dig. VI, 266; *Tagliaferro (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 765.

² Mr. Marcy, Sec'y of State, to Baron de Kalb, July 20, 1855, 2 Wharton, 505; Mr. Buchanan, Sec'y of State, to Mr. Ten Eyck, Aug. 28, 1848, Moore's Dig. VI, 273; Mr. Marcy, Sec'y of State, to Mr. Clay, May 24, 1855, *ibid.* 659.

³ *Fabiani (France) v. Venezuela*, Feb. 24, 1891, Moore's Arb. 4878 at 4895, and authorities there cited.

⁴ *Akerman, Atty. Gen.*, in 13 Op. Atty. Gen. 547; *Poggioli (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 869.

⁵ *Supra*, p. 292.

⁶ 2 Wharton, § 235, For. Rel., 1885, 525 (trespasses and evictions); Mr. Bayard, Sec'y of State, to Mr. Thompson, Mar. 9, 1886, Moore's Dig. VI, 704; Mr. Bayard,

unlawful arrest or detention of a person;¹ the unduly long detention or imprisonment without trial or allegation of offense of persons accused of crime,² either in violation of municipal law³ or of treaty;⁴ the execution of an accused person without trial;⁵ the detention and confiscation of vessels without legal process;⁶ inexcusable delay in investigating the circumstances of a charged offense preliminary to a criminal prosecution;⁷ permitting a guilty person to escape or failure to institute proceedings against such a person;⁸ the intentional obstruction of claimant's attempt to obtain judicial redress;⁹

Sec'y of State, to Mr. Buck, Jan. 19, 1888, *ibid.* 254; Hammond (U. S.) v. Mexico, Apr. 11, 1839, Moore's Arb. 3241; Cheek (U. S.) v. Siam, Moore's Arb. 1899-1908, For. Rel., 1897, 461-480 (violation of treaty and of Siamese law).

¹ *Supra*, p. 98.

² Mr. Frelinghuysen, Sec'y of State, to Mr. Lowell, Apr. 25, 1882, For. Rel., 1882, 230, Moore's Dig. VI, 276; Mr. Bayard, Sec'y of State, to Mr. Jackson, July 26, 1886, *ibid.* 281. Cases before Spanish Treaty Claims Com., Final Report, p. 14. *Supra*, p. 99.

³ Driggs (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 3125; Molière (U. S.) v. Spain, Feb. 12, 1871, *ibid.* 3252; The *Jane* (U. S.) v. Mexico, April 11, 1839, *ibid.* 3119; Kelley (U. S.) v. Mexico, Mar. 3, 1849, Opin. 312 (not in Moore). *Supra*, p. 99.

⁴ Mr. Buchanan, Sec'y of State, to Mr. Campbell, Dec. 11, 1848 (holding citizen "incommunicado"), Moore's Dig. VI, 274; *Ingrid* case, S. Rep. 824, 63d Cong., 2nd sess., H. Doc. 1172, *ibid.*; Sartori (U. S.) v. Peru, Jan. 12, 1863, Moore's Arb. 3120 (imprisonment without formal commitment and undue delay, 48 hours, in taking claimant's declaration); Cases before Spanish Treaty Claims Com., Final Report, p. 14. In time of war, the strict requirements of civil process are often suspended. Stetson (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3131. *Supra*, p. 99.

⁵ *Portuondo* (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. 3007. The killing of Cannon and Groce by Zelaya without trial, instead of their treatment as prisoners of war, inasmuch as they were taken while fighting in the ranks of the revolutionists, constituted the basis of the U. S. claim against Nicaragua, 1909.

⁶ The *Jane* (U. S.) v. Mexico, April 11, 1839, Moore's Arb. 3119 (detention); Andrews (U. S.) v. Mexico, July 4, 1868, *ibid.* 2769; Stetson (U. S.) v. Mexico, *ibid.* 3131 (violation of treaty). *Supra*, p. 99.

⁷ Mr. Blaine, Sec'y of State, to Mr. Ryan, June 28, 1890, Moore's Dig. VI, 282; Renton claim v. Honduras, For. Rel., 1904, 352, 363; Bark *Jones* (U. S.) v. Great Britain, Feb. 8, 1853, Moore's Arb. 3054; Andrews (U. S.) v. Mexico, July 4, 1868, *ibid.* 2769.

⁸ Cases of Robert, in Spain, 1876 and of Capt. Cornwall in 1871, G. de Leval, § 99. See also *supra*, p. 218 and notes.

⁹ Mr. Evarts, Sec'y of State, to Mr. Fairchild, Jan. 17, 1881, Moore's Dig. VI, 656; Ballistini (France) v. Venezuela, Feb. 19, 1902, Ralston, 503.

unlawful change of venue; ¹ fixing an unreasonably brief time in which to sue; ² or illegal change in the personnel of the court or the use of other unlawful means to influence the court's decision. ³

The methods by which justice may be denied in the course of a trial or judicial proceedings are too numerous to detail. In a general way, the conduct of a trial with palpable injustice ⁴ or in violation of the settled forms of law or of those rules for the maintenance of justice which are sanctioned by international law ⁵ warrants diplomatic interposition. Thus, for example, a violation of the rules of municipal law or procedure or of treaties, by which injustice is perpetrated or a foreigner is unduly discriminated against, ⁶ by the refusal to hear testimony

¹ *Bark Jones* (U. S.) v. Great Britain, Feb. 8, 1853, Moore's Arb. 3048 (Opinion by Upham).

² Mr. Hay, Sec'y of State, to Mr. Dudley, Mar. 28, 1899, Moore's Dig. VI, 1003.

³ *Idler* (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 3517; *Cases in Mexico*, 1912-1914.

⁴ Mr. Evarts, Sec'y of State, to Mr. Langston, April 12, 1878, 2 Wharton, 623, Moore's Dig. VI, 623; Mr. Bayard, Sec'y of State, to Mr. Jackson, Sept. 7, 1886, Moore's Dig. VI, 680; Mr. Fish, Sec'y of State, to Mr. Cushing, Dec. 27, 1875, 2 Wharton, 621. The *Rebecca*, Mr. Bayard, Sec'y of State, to the President, Feb. 26, 1887, Moore's Dig. VI, 666-668 (U. S. did not press this case to successful settlement).

⁵ Vattel, Chitty-Ingraham ed., 165. Mr. Bayard, Sec'y of State, to Mr. Morrow, Feb. 17, 1886, Moore's Dig. VI, 280; *Parrott* (U. S.) v. Mexico, Mar. 3, 1849, Moore's Arb. 3009; *Cotesworth and Powell* (Gt. Brit.) v. Colombia, Dec. 14, 1872, Moore's Arb. 2050, 2081.

⁶ Mr. Marcy, Sec'y of State, to Mr. Fay, Nov. 16, 1855, Moore's Dig. VI, 655; Mr. Marcy to Baron de Kalb, July 20, 1855, 2 Wharton, 505; Mr. Bayard to Mr. Morrow, Feb. 17, 1886, Moore's Dig. VI, 280; *Rozas* (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. 3124 (trial by military proceedings contrary to treaty); *Van Bokkelen* (U. S.) v. Haiti, May 24, 1888, *ibid.* 1812, 1845 (denial of right to make assignment, contrary to treaty); *Cotesworth and Powell* (Gt. Brit.) v. Colombia, Dec. 14, 1872, Moore's Arb. 2050, 2084 (absence of judge from official duties involving special damage); *Garrison* (U. S.) v. Mexico, July 4, 1868, *ibid.* 3129 (gross irregularities, and prevention of appeal by intrigue; *Idler* (U. S.) v. Venezuela, Dec. 5, 1885, *ibid.* 3517 (illegal change in personnel of court, and wrongfully invoking of obsolete remedy by government ending claimant's litigation in court); *Diana*, Gardner (U. S.) v. Great Britain, Nov. 19, 1794, *ibid.* 3073 (unjust order to pay costs under art. VII of Jay treaty); *The Neptune* (U. S.) v. Great Britain, Nov. 19, 1794, *ibid.* 3076 (arbitrary valuation and sale of captured cargo). The condemnation by a Russian prize court of the S. S. *Oldhamia* was considered by Sir Edward Grey as a denial of justice because against the weight of evidence. Misc. No. 1 (1912), Cd. 6011, p. 17; *Pradel* (U. S.) v. Mexico, July 4, 1868, *ibid.* 3141 (fine in course of illegal trial). See Bullis

on behalf of a defendant charged with crime,¹ or an undue or needless delay in the trial or decision of a case,² have all been construed as denials of justice. When feasible and where an effective remedy seems probable, all modes of appellate revision must be exhausted before diplomatic interposition becomes proper. It may be noted that irregularities in the course of judicial proceedings, not amounting technically to a denial of justice or an undue discrimination against a citizen (as an alien), have not been considered as a ground for the interference of the United States.³ It may not always be easy to determine when an irregularity is sufficiently gross so as to become a denial of justice.

A denial of justice after trial may be said to occur when the proper authorities of a foreign country refuse to execute the laws as interpreted by the courts of the country or to give effect to the decisions of the courts;⁴ when they fail to punish guilty offenders, or mete out inadequate punishment;⁵ when they grant a pardon or amnesty by which the alien plaintiff is deprived of the right to try the question of liability;⁶ when they unlawfully prevent an appeal by the claimant;⁷

(U. S.) *v. Venezuela*, Feb. 17, 1903, Ralston, 169, 170 (*dictum*) for criteria of denial of justice. For the position of the U. S. when an alien's treaty rights are violated by state authorities, see *supra*, § 45.

¹ Mr. Conrad, Acting Sec'y of State, to Mr. Peyton, Oct. 12, 1852, 2 Wharton, 613, Moore's Dig. VI, 275; Mr. Bayard to Mr. Jackson, Sept. 7, 1886, Moore's Dig. VI, 680; *The Schooner Good Intent v. U. S.*, 36 Ct. Cl. 262.

² Mr. Frelinghuysen, Sec'y of State, to Mr. Morgan, Mar. 5, 1884, Moore's Dig. VI, 277, 2 Wharton, 637; Protocol between France and Venezuela, Feb. 11, 1913, Suppl. to 7 A. J. I. L. (July, 1913) 218 (15 months' delay in judgment of municipal court gives international tribunal jurisdiction). See also the *Sally*, Hays (U. S.) *v. Great Britain*, Nov. 19, 1794, Moore's Arb. 3101-19. *Supra*, p. 99.

³ Mr. Marcy, Sec'y of State, to Mr. Starkweather, Aug. 24, 1855, Moore's Dig. VI, 264; Mr. Olney, Sec'y of State, to the President, Feb. 5, 1896, For. Rel., 1895, I, 257. Gross irregularities were considered a denial of justice in *Garrison (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3129; *Idler (U. S.) v. Venezuela*, Dec. 5, 1885, *ibid.* 3510, 3517, 3524, and other cases cited in footnote 6, page 338.

⁴ *E. g.*, neglect or refusal to execute judgment. *Montano (Peru) v. U. S.*, Jan. 12, 1863, Moore's Arb. 1630, 1634; *Fabiani (France) v. Venezuela*, Feb. 24, 1891, *ibid.* 4878 at 4893, 4907 (in violation of treaty); *Claim of W. R. Grace v. Peru*, Mr. Neill to Mr. Hay, Sec'y of State, Nov. 19, 1903, For. Rel., 1904, p. 678.

⁵ *Supra*, p. 218, notes 2 and 3.

⁶ *Supra*, p. 218, note 6.

⁷ *Garrison (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3129.

or inflict unnecessarily harsh, cruel or arbitrary punishment upon a prisoner.¹

It is also to be noted that a grossly unfair or notoriously unjust decision may be and has been considered as equivalent to a denial of justice.² According to the older authorities, a judicial sentence notoriously unjust, to the prejudice of an alien, entitles his government to interfere for reparation even by reprisals.³ But the inference is that this doctrine is intended to apply primarily to the decisions of prize courts and not to those of municipal courts construing municipal law.⁴

§ 130. Extent to which Unjust Judgment of Municipal Court is Internationally Binding.

This brings us to one of the most difficult questions in international practice, namely, the extent to which an unjust judgment of a municipal court is internationally binding. When the court merely errs as to fact or the interpretation of its municipal law there appears to be, on principle, no ground for international reclamation, provided the court was competent and observed the regular forms of law.⁵ Given good faith, a fair opportunity to the alien to be heard, and the absence of discrimination between native and foreigner, it would seem that the judgment of a municipal court interpreting municipal law is internationally conclusive, even if in error. In practice, however, governments have assumed an extended right to protest diplomatically against the judgments of foreign courts affecting their citizens, when they consider the decisions grossly unjust. It may be added that the earlier

¹ *Supra*, p. 99.

² Mr. Evarts, Sec'y of State, to Mr. Foster, April 19, 1879, Moore's Dig. VI, 696 (collusive judgment); *Bronner (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3134; *Barron (Gt. Brit.) v. U. S.*, May 8, 1871, *ibid.* 2525, Hale's Rep. 164; *Idler (U. S.) v. Venezuela*, Dec. 5, 1885, *ibid.* 3491, 3510. See also *Comegys v. Vasse*, 1 Peters, 193.

³ Dana's Wheaton, §§ 391-393, quoting Grotius, Bynkershoek and Vattel.

⁴ Dana's Wheaton, § 392.

⁵ Grotius, Bk. III, ch. 7, § 84; Vattel, II, ch. 18, § 350; Klüber, 2nd ed., 1874, § 57; Fiore, *Dr. int. pub.*, Antoine's trans., §§ 404-405; G. F. de Martens, *Précis du droit des gens*, § 94; Pradier-Fodéré, I, § 403; Pomeroy, Boston ed. (1886), by Woolsey, § 205; Baty, 1909 ed., 77 *et seq.*

writers did not make any clear distinction between a notoriously unjust decision and a flagrant denial of justice.¹

If the courts have maliciously misapplied their municipal law, or denied a foreigner the benefit of due process of law in any stage of the proceedings, the reclamation would be founded upon a denial of justice, as mentioned above. It is a fundamental principle of the conflict of laws that a foreign judgment is always impeachable for want of jurisdiction of the person of the defendant or of the subject-matter.² Apart from this ground (except where the judgment was obtained by fraud),³ courts have little power to impeach a foreign judgment.⁴ As already observed, however, the executive branch of the government has not hesitated to deny validity to the judgment of the highest court of a foreign state when the judgment appeared manifestly unjust. The question becomes exceedingly delicate when the judgment alleged to be unjust was reached by the observance of the regular forms of procedure. A diplomatic claim under these circumstances is in effect an impeachment of the sovereignty of a foreign state,⁵ and on this ground the countries of Latin-America have often protested against such claims. It may be said that before an international claim ought to be considered well-founded it should be shown that the decision was so palpably unjust that the good faith of the court is open to suspicion. The difficulty in actual practice, as remarked in the case of denial of justice, is that the claimant government assumes the right to determine for itself whether the judgment is sufficiently unjust to warrant diplomatic interposition.⁶

¹ Pradier-Fodéré, note to his edition of Vattel, II. ch. 18, § 351 and Vergé's note to De Martens Précis, II, § 257, p. 193.

² 23 Cyc. 1576. See also *Idler (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3491, 3511; *Flutie (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 38, 41.

³ *Abouloff v. Oppenheimer* (1882), 10 Q. B. Div. 295; *Vadala v. Lawes* (1890), 25 Q. B. Div. 310. See also 23 Cyc. 1589.

⁴ Piggott, *Foreign judgments*, I, 356 (1903 ed.); 32 *Canada Law Times* (1912), 968-970. The enforcement of a foreign judgment generally depends on treaty or comity.

⁵ Elihu Root in 3 A. J. I. L. (1909), 529-536.

⁶ See Señor Mariscal's able exposition in the Schooner *Rebecca* case, Sen. Doc. 328, 51st Cong., 1st sess., 43 *et seq.* A criticism of art. 11 of the Venezuelan law of 1903 and the Salvadorean law of May 10, 1910, to the effect that "notorious injustice," as expressed in those statutes, is not truly a valid ground of international reclamation

The Department of State and arbitral tribunals have rejected the plea of *res adjudicata* advanced by defendant governments in support of the finality of the judgments of their courts. Thus Secretary of State Bayard in 1887 declared:

"This Department has contested and denied the doctrine that a government may set up the judgment of one of its own courts as a bar to an international claim, when such judgment is shown to have been unjust or in violation of the principles of international law."¹

When a court presumes to pass upon questions of international law there is little doubt that foreign governments need not acquiesce in the judgments of such courts when they misapply or violate the principles of international law.² This rule has often been illustrated by the institution of international claims against the decisions of prize courts, which have either been diplomatically settled or submitted to arbitration.³ While the decisions of prize courts acting *in rem* bind the parties, so far as concerns the particular litigation, they may be contested by the government of the party which feels aggrieved.⁴ The

was published by A. de Busschère, the Belgian jurist, in 3 *Rev. de derecho y legislación* (Caracas, Oct., 1913), pp. 3-6. European governments have taken quite the opposite view.

¹ Mr. Bayard to the President, Feb. 26, 1887, Moore's Dig. VI, 667. See also Mr. Bayard to Mr. Hall, Nov. 29, 1886, *For. Rel.*, 1887, p. 81, Moore's Dig. VI, 268. See also *ibid.* 691. The Department has never consented to the doctrine that a government could make the judgments of its courts internationally binding. See also Howland (U. S.) *v.* Mexico, Apr. 11, 1839, Moore's Arb. 3227; Mather and Glover (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 3231.

² Martens, *Précis*, § 97.

³ Dana's *Wheaton*, §§ 392-397; 3 Wharton, § 329a; Oppenheim, II, § 557; The *Betsey*, Furlong (U. S.) *v.* Great Britain, Nov. 19, 1794, Moore's Arb. 3160-3209, especially Pinckney's opinion at 3180, and other cases under the Jay treaty. The British-American commission under treaty of May 8, 1871 reviewed numerous prize decisions of the U. S. Supreme Court, and reversed several of them by awarding indemnities to the claimants: *e. g.*, The *Hiawatha*, 2 Black, 635, Moore's Arb. 3902; The *Circassian*, 2 Wall. 135, Moore's Arb. 3911; The *Springbok*, 5 Wall. 1, Moore's Arb. 3928; The *Sir William Peel*, 5 Wall. 517, Moore's Arb. 3935; The *Volant*, 5 Wall. 179, Moore's Arb. 3950; The *Science*, 5 Wall. 178, Moore's Arb. 3950. See also The *Orient* (U. S.) *v.* Mexico, Apr. 11, 1839, Moore's Arb. 3229; *Felix* (U. S.) *v.* Mexico, Mar. 3, 1849, *ibid.* 2800-2815; Henry Wheaton in 20 *St. Pap.* 871-872; Danish Indemnity, Moore's Arb. 4550 and 4556-4557. See also Lapradelle and Politis, *Recueil*, I, 96-98 and 499.

⁴ 3 Wharton, 193.

international prize court planned by the Second Hague Conference was to hear appeals from national prize courts, and was intended to take out of the channels of diplomacy the complaints which are so frequently directed against the decisions of these courts.¹

It will be noted hereafter, that within the terms of the protocol establishing it, an international tribunal is superior to the local courts,² and that an arbitral court adjudicating claims between two nations will make its award independently of the previous decisions of the local courts,³ unless its jurisdiction is expressly limited.⁴

¹ In theory, the decision of the highest municipal court is not reversed by the international tribunal, but the whole question of the international responsibility of the state is resubmitted. This limitation upon the proposed jurisdiction of the International Prize Court was contained in an additional agreement of Sept. 9, 1910, between the U. S. and Great Britain and other powers.

² *Infra*, p. 806. See Selwyn (Gt. Brit.) *v.* Venezuela, Feb. 13, 1903, Ralston, 322 and citation of authorities, pp. 324-325.

³ The *Phare* (France) *v.* Nicaragua, Moore's Arb. 4871.

⁴ Le More (France) *v.* U. S., Jan. 15, 1880, *ibid.* 3232.

CHAPTER IX

RELATION BETWEEN STATES

§ 131. Mutual Concessions by States.

Having considered the legal relation subsisting between the state and its citizen abroad and between a particular state and resident aliens, the ground has been laid for a consideration of the relationship between the two states themselves, the national state and the state of residence.

It has been observed¹ that by the weight of authority international law is obligatory upon states only, and that the individual is not the subject of international rights or duties, either in the sense of possessing an independent power to enforce his rights internationally or of being internationally liable for a failure to perform his duties. His rights and duties arise from municipal subjection to the personal sovereignty of his home state and to the territorial sovereignty of the state of residence.² The latter's municipal law and administration in its application to the alien must conform with that indefinite standard of civilized justice created by international law and custom, subject to international responsibility to the alien's home state. Hence the citizen abroad, though deriving his rights from municipal law, brings about international legal relations of a complicated character between the states exercising control over him.

Membership in the international community is predicated, as has been observed, upon the possession by a state of certain legal characteristics, notably personal sovereignty over its subjects, and territorial independence or jurisdiction.³ The control which, by virtue of its sovereignty, the state possesses over its national at home and abroad, and that which, by virtue of its territorial independence, it possesses

¹ *Supra*, § 9.

² Heilborn, *System*, 75 *et seq.*; Despagnet, 4th ed., § 316.

³ *Supra*, pp. 21, 25.

over all persons on its territory would, if unconditionally and strictly exercised, constitute mutually conflicting and irreconcilable forces. As a matter of fact, the impossibility of a state existing in rigid isolation, and the necessity of entering into relations with other states in the international community, has compelled on the part of each state certain restrictions upon its freedom of action and a modification of any theoretical claim it may have had to *absolute* authority over its subjects abroad or over all the inhabitants of its territory.

It has already been observed that the bond which exists between the state and its citizen is not severed by his departure from the national territory, but that the state, for most practical purposes, yields control over its citizen abroad to the state in which he resides.¹ This is the case at least among countries of advanced civilization. The territorial independence by virtue of which the state prescribes the rights and duties of persons within its territory, is itself, however, limited in two ways: indirectly, by the obligation, imposed by international law, of not permitting its municipal law and administration to fall below the indefinite standard set by international law and custom, a result which, as to substantive law, practically never occurs in countries not subject to extraterritoriality; and directly, by conceding or being compelled to concede to foreign states certain rights, *e. g.*, the immunity of foreign sovereigns and public vessels from the territorial jurisdiction, the right of foreign consuls to exercise a limited jurisdiction over their national merchant vessels, the application of his national law to many private legal relations of the alien, and other rights and immunities which have become customary.² The citizen abroad is thus subject to a certain control of both the personal and the territorial sovereign, each requiring forbearances on the part of the other. Personal sovereignty or control and territorial independence or jurisdiction, therefore, are not absolute, but relative, terms and are mutually complementary with respect to citizens abroad.

The numerous spheres in which custom has instituted derogations

¹ *Supra*, p. 21; Hall, W. E., *Foreign powers and jurisdiction of the British Crown*, Oxford, 1894, p. 2 *et seq.*

² On the limitations upon independence, see Pillet, A., *Recherches sur les droits fondamentaux des états*, Paris, 1899, p. 13; and Rougier in 17 R. G. D. I. P. (1910), 480.

from the fullness of local jurisdiction in favor of foreigners, foreign consuls and foreign property, such as ships, are traceable not merely to comity but to a mutual recognition that in certain matters the interests of individuals are more satisfactorily protected by giving jurisdiction or other powers to their national sovereign, in other words, the indirect operation of the protective function has resulted in certain derogations from complete territorial jurisdiction. In countries in which extraterritoriality prevails, these derogations assume wide proportions, and are the outgrowth of compulsory concession rather than voluntary grant on a basis of reciprocity.

§ 132. Diplomatic Protection a Limitation on Territorial Jurisdiction.

In the mutual relation of states in international intercourse, the home state of a citizen abroad yields the exercise of its personal control or sovereignty over its citizen in favor of the territorial sovereignty of the state of residence, on the condition that the latter's system of law and administration is in its application to aliens within the standards prescribed by international law and recognized custom. If its laws are arbitrarily unreasonable and out of harmony with the standard of civilized states, or if the administration of the laws transgresses the prescriptions of civilized justice, or if in any respect there is an abuse of the rights of territorial jurisdiction as provided by treaties or established custom, the personal sovereignty of the home state reasserts itself and emerges in the form of diplomatic protection. This potential right, which the home state always reserves, acts as a check upon the state of residence and as a corrective against the excessive or abusive application of the territorial jurisdiction. In its operation, it prevents invasions of the rights of citizens abroad or exacts reparation for injuries or unlawful oppression which they may have suffered. In states of the European type there is less occasion for the employment of this protective right than in states of less stable organization. The application of the right of diplomatic protection increases in rigor in direct ratio with the weakness of the local protection accorded by the state of residence. In countries like Turkey and China, this protective right has actually assumed the form of foreign jurisdiction. In the absence of any central authority over states having power to enforce the principles of international law,

the right of diplomatic protection has self-help for its sanction, and as it is most often resorted to by strong against weak states, it is readily apparent how the rights of the weaker states have been liable to abuse; so that the complaints of Calvo, Pradier-Fodéré, Seijas, Lisboa and others, on behalf of the Latin-American states, are undoubtedly, in large degree, justified. The undue enforcement of the right of protection has often served to give aliens who are the subjects of strong states, when resident in weak states, a privileged position, not enjoyed by natives or the nationals of weak countries.

All civilized states admit that in order to live in the society of states, they must yield some share of their absolute liberty of action and that their rights must be reconciled with the reciprocal rights of other states. Various forces thus interact to bring about the existing rules of international intercourse. Among these mutual concessions, the one of present interest is the fact that the territorial sovereignty or jurisdiction of a state has to be reconciled with the right of other states to protect their nationals abroad, an outgrowth of principle and practice, rather than the subject of formal written admission.

PART II

THE EXERCISE OF DIPLOMATIC PROTECTION

CHAPTER I

NATURE, BASIS AND THEORY OF PROTECTION

§ 133. Fundamental Principles.

The study which has been made of the relation between the state and its citizen, of the position of aliens, of the municipal and the international responsibility of the state, and of the relation between the protecting state and the state of residence warrants a reconsideration of these matters in their relation to the nature, the basis and the exercise of the right of diplomatic protection.

Each state in the international community is presumed to extend complete protection to the life, liberty and property of all individuals within its jurisdiction.¹ If it fails in this duty toward its own citizens, it is of no international concern.² If it fails in this duty toward an alien, responsibility is incurred to the state of which he is a citizen, and international law authorizes the national state to exact reparation for the injury sustained by its citizen. The foreigner in entering a country tacitly undertakes to accept the laws and institutions which the inhabitants of the country find suitable to themselves. By becoming a resident, he undertakes the obligation of obedience to the laws, and assumes a certain relationship to the state of residence which has been popularly characterized as "temporary allegiance." This involves both rights and duties, although with respect to both, there

Morse, *Citizenship*, Boston, 1881, § 4.

² Unless the state deviates so grossly from the paths of civilized administration and justice that intervention on the ground of humanity is justified. *Supra*, p. 14.

is usually a measure of difference between the transient and the domiciled alien. If the alien receives the benefit of the same laws, administration, protection and means of redress for injuries which the state accords to its own subjects, the national government of the alien has no ground to complain or interpose in his behalf, *provided* that the system of municipal law, administration and protection applied to citizens meets the recognized standards of civilized justice. Foreigners are left to the territorial jurisdiction of the state of residence for the measure of their rights and the redress of their grievances on the assumption that justice will be applied to them, according to a civilized system of law and administration, with integrity and impartiality. An allegation of a denial of justice, the customary ground of an international claim, rests upon an alleged departure from this standard, either in the law itself or in its administration. It is difficult to establish the exact measure of this standard of civilized justice except by the general practice of the more advanced states. International pecuniary claims are so common because, as in the case of political claims, the justice which a state demands for its nationals is not measurable by definite rules. Nevertheless, the general acceptance of certain fundamental principles, a certain minimum of customary requirements incorporated in the law and procedure of the states of European civilization, and a long-extended experience of adjusting international claims, particularly by arbitration, have developed sufficiently definite rules of conduct for the establishment of a satisfactory international standard of justice, to which the rights of aliens may ultimately be referred. Diplomatic interposition in behalf of aliens merely because the local laws and procedure are different from those of the protecting state, without proving that the application of the law in a given case falls below the international standard of civilized justice, is a practice which has resulted on numerous occasions in securing for aliens in some of the weaker states of the world a privileged position as against nationals, a condition against which some of the Latin-American countries and their publicists have, at times, with some justice, protested. The alien in these cases instead of constituting an addition to the national wealth and resources, has become a liability and a detriment to the state.

§ 134. Theory of the State's Protection.

The interest of the state in protecting its citizen abroad is justified upon the theory formulated by Vattel: "Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety."¹ The indirect injury which the state sustains by an injury to one of its citizens warrants bringing into operation the state's protective machinery.²

This principle, however, requires modification and amplification, for it does not fully explain the action of the state. In the first place, reparation is demanded only for such injuries as the state in its discretion deems a justification for diplomatic protection. Factors which enter into consideration in determining the state's interposition are the seriousness of the offense, the indignity to the nation, and the political expediency of regarding the private injury as a public wrong to be repaired by national action—in short, the interests of the people as a whole as against those of the citizen receive first consideration before state action is initiated.³

In the second place, not every injury warrants immediate interposition by the state. It is only when the citizen has suffered flagrant injustice or maltreatment by or at the direction of an authority of the state of residence, that his national government is warranted in taking immediate measures of repression.⁴ If the injury is received at the hands of individuals or minor officials, who cannot be regarded as representing the government, the individual must in first instance be remitted to his local judicial remedies, and only in the event of a denial

¹ Vattel, Chitty-Ingraham ed., Phila., 1855, Bk. II, ch. VI, § 71.

² See, e. g. Phillimore, 3rd ed., II, 4; Morse, Citizenship, XII and 60, 61; Pradier-Fodéré, I, § 402; Bello and Liszt cited in For. Rel., 1899, 31-40; Mr. Root, Sec'y of State, to the Persian minister, Nov. 7, 1906, For. Rel., 1907, 942. See also Amer. St. Pap. IV, 718; Annals, 15th Cong., 1st sess., 282; Selwyn (Gt. Brit.) v. Venezuela, Feb. 13, May 7, 1903, Ralston, 322. The idea that the nation will avenge the wrongs done to its citizens goes back to the earliest times. See Morse, *op. cit.*, 110.

³ See, e. g., Fiore, *Nouveau dr. int. pub.* (Antoine's trans.), § 646, citing Heffter, § 59 and Phillimore, II, ch. 2; Lomonaco, 217, citing Grotius.

⁴ Hall, 6th ed., 273; Phillimore, 3rd ed., II, 4.

of justice, as that term is understood in international law, may the state properly interpose in his behalf.

In the third place, although the state in prosecuting the offense committed against its citizen is presumed to avenge and seek compensation for the injury to its national welfare and dignity, an injury quite independent of that sustained by its citizen, it nevertheless happens, in practice, that the largest proportion of claims are dropped at the moment the citizen changes his nationality or assigns his claim to the subject of another state. This result has been established by numerous arbitral decisions and by the practice of Foreign Offices.¹ If it were merely the injury to the welfare or dignity of the nation for which compensation is sought, the subsequent act of the citizen would hardly lessen the injury, or weaken the right or power of the state to exact reparation. As a matter of fact, Vattel's theory of the indirect injury to the state in the person of its citizen, merely explains the initial action of the state in bringing its protective machinery into operation. The citizen may well relieve the state of further interest in his case by changing the nationality of the claim or of the claimant. While the injury to the state and the injury to the citizens are independent wrongs, the action of the state in demanding compensation is in large degree dependent upon the subsequent conduct of the citizen in supporting the title and right of his government to interpose in his behalf. The circumstance must not, however, be overlooked, that injuries inflicted upon certain officials representative of the government or upon public vessels or other public property, give rise to national offenses only, to the exclusion of private claims, and that certain classes of injuries to individuals, when deemed to involve affronts to the nation, survive any assignment or settlement by the private claimant.²

§ 134a. Diplomatic Protection an Extraordinary Legal Remedy.

The theory that the indirect injury to the state in the person of its

¹ *Infra*, § 306. See particularly *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 17, 1903, 446-447. This principle of arbitral decisions may be explained by the fact that protocols practically always grant jurisdiction over injuries to "subjects" or "citizens" and not to "the dignity of the nation." If a claimant has ceased to be a citizen at the time his claim is presented, jurisdiction is denied.

² *Infra*, § 142.

citizen justifies diplomatic interposition does not, it is obvious, fully explain the state's action. Diplomatic protection may more properly be considered as an extraordinary legal remedy granted to the citizen, within the discretion of the state, under certain circumstances in harmony with the public interests of the state, its relations with other states, and the rights and equities of the citizen.

It is to be noted that the state may be injured in two ways: (1) directly, by violation of the rights affecting the collectivity or people as a whole; and (2) indirectly, by violation of the rights of its citizens. It will be seen hereafter¹ that injuries of the latter class which involve specific affronts to the nation, cannot be extinguished by private settlement, but that they survive restitution or compensation to the individual. On the other hand, if the injury involves no element of national insult, the restoration of the individual to his rights by the institutions or authorities of the defendant state annuls any further interest of his own government. The individual has in fact sustained no "injury" in international law, until the state of residence or its authorities have in some way connected themselves with the original act or have declined to afford him legal means of redress.

§ 135. Basis of the Public Action of the State.

The action of the state in exercising the right of diplomatic protection, being based upon its independent claim against other states to have its nationals treated in accordance with the rules of international law, has been founded by various writers upon its right of self-preservation,² the right of equality,³ and the right of intercourse.⁴ While it may be true that the habitual unredressed violation of the rights of its citizens abroad would weaken the state both materially and in prestige, and to that extent, impair its integrity and its power among nations, the injuries to the subjects of a given state are never so habitual, so numerous or so widespread as actually to endanger the safety of the state. It seems preferable to consider the state's action

¹ *Infra*, § 142.

² Hall, 6th ed., 273 *et seq.*; Hall, *Foreign powers and jurisdiction*, etc., § 2; Rivier, *Principes*, I, 269; Despagnet, 4th ed., 1910, § 172.

³ Pomeroy, *Lectures*, Woolsey's ed., Boston, 1886, § 205 *et seq.*

⁴ Oppenheim, I, §§ 142, 319.

as a sanction for the right of international intercourse between states and individuals, according to the standard of conduct and treatment recognized as proper and lawful by international law and practice.

§ 136. Protection in Operation.

The right of protection is, as already observed, a limitation upon the right of jurisdiction. The former cannot oust the latter—except by treaty¹—but has the power to require that as to aliens it shall be exercised in a regular, legal, just and impartial manner.² The right of protection which every state possesses is correlative to its obligation to accord foreigners a measure of treatment satisfying the requirements of international law and relevant treaties, and to its responsibility for failure to accomplish this duty.³ Diplomatic protection is in its nature an international proceeding, constituting “an appeal by nation to nation for the performance of the obligations of the one to the other, growing out of their mutual rights and duties.”⁴ This right of the state is, as an international phenomenon, a manifestation of its power over the individuals under its allegiance to prevent or repress on the part of other states any invasion of their rights or any pretension not finding its basis in international law.⁵ As no municipal statutes specify the circumstances and limits within which this right of protection shall be exercised, each government determines for itself the justification, expediency and manner of making the international appeal. The merits of its right to exercise diplomatic protection may, however, be referred to an independent, if not altogether certain, standard—the standard of civilized conduct toward aliens recognized as proper by international law.

¹ *I. e.*, in countries where extraterritorial rights are exercised.

² Pomeroy, *op. cit.*, §§ 205–206.

³ Oppenheim, I, § 142; Hall, 6th ed., 273. Hall's statement is concise and thoughtful.

⁴ Mr. Blaine, Sec'y of State, to Mr. Caamano, Mar. 19, 1890, Moore's Dig. VI, 256.

⁵ Heilborn, System, 64 *et seq.*

CHAPTER II

RELATION BETWEEN THE PRIVATE AND THE PUBLIC INJURY

§ 137. Method of Presenting a Private Claim.

It has been noted that governments are to a certain extent subject to suit at the hands of an alien in their own municipal courts. This right of suing the state is more general in most foreign countries than in the United States. When local means of redress have been exhausted in a vain effort to obtain justice and the international responsibility of the state is invoked, the alien's only recourse to obtain satisfaction is through the interposition of his own government.

In 1874 Congress adopted the rule that it would not consider the claims of aliens against the United States unless presented through the Department of State. The Department itself has had frequent occasion to inform alien claimants that it "refuses to entertain applications or to receive claims from aliens except through a responsible presentation by the regularly accredited representative of their government."¹ The government must assume responsibility for the presentation of claims.²

A mere transmission of the claim by the diplomatic representative at the request of the claimant without an indication of the approval, support and authorization of the foreign government will not satisfy this requirement.³ The representative may, however, without making a claim, call attention unofficially and on his own responsibility, to a past or impending injustice to one of his nationals and his note will receive due consideration.

¹ Magoon's Report, 338, 340 quoting Sec'y of State Fish to Mr. Lawrence, Apr. 22, 1874.

² *U. S. v. Diekelman*, 92 U. S. 520; Moore's Dig. VI, § 970.

³ Mr. Seward, Sec'y of State, to Count Wydenbruck, Nov. 28, 1866, Dipl. Cor. 1866, I, 691. Mr. Frelinghuysen, Sec'y of State, to Baron de Fava, June 21, 1884, Moore's Dig. VI, 608.

§ 138. Citizen's Title to Protection not a Legal Right. An Extraordinary Legal Remedy.

Whatever rights the citizen may have to diplomatic redress are as against his own, not the foreign government. It is hardly correct, however, to speak of the citizen's power to invoke the diplomatic protection of the government as a "right" of protection. As will be observed presently, his call upon the government's interposition is addressed to its discretion. At best, therefore, it is an imperfect right, in the sense of Vattel,¹ that a right is always imperfect when the corresponding obligation depends on the judgment of another. Being devoid of any compulsion, it resolves itself merely into a privilege to ask for protection. Such duty of protection as the government may be assumed to owe to the citizen in such cases is a political and not a legal one, responsibility for the proper execution of which is incurred to the people as a whole, and not to the citizen as an individual.

Assuming that the citizen has a claim to indemnity from a foreign government, the property right therein involved exists in full force as a chose in action.² The power to enforce the right is suspended not because there is no remedy,³ but because there is no forum having jurisdiction to compel the foreign government to pay the claim. Such remedy as the claimant has it is within the discretion of his own government, through diplomatic measures, to accord, and no legal means exists to compel his government to prosecute the claim. In the exercise of the extraordinary remedy known as diplomatic protection, the government acts politically upon its own responsibility as a sovereign, free from any legal restrictions by or legal obligations to the claimant.

§ 139. Merger of the Private Claim into the National Claim of the State.

As between the government and its own citizen the claim may in some degree be regarded as private.⁴ It becomes international in character when the government espouses it and presents it diplomatically

¹ Vattel, *Law of nations*, Chitty-Ingraham ed., Phila., 1855, § 17.

² *Meade v. U. S.*, 2 Ct. Cl. 224.

³ *Gray v. U. S.*, 21 Ct. Cl. 392; *Camy (France) v. U. S.*, Jan. 15, 1880, *Boutwell's Rep.* 105, *Moore's Arb.* 2400.

⁴ Although, as will be seen, it is by no means subject to the rules of private law.

to the debtor government.¹ When it is thus taken up, the private claim becomes merged in the public demand of the government, so that from the international point of view the government, having made the claim its own, assumes the character of the party claimant.²

Diplomatic protection is in its nature an international proceeding. When a citizen appeals to his government to demand redress from a foreign government in his behalf, he thereby voluntarily makes his claim a subject of international negotiation independent of his control, and must abide by such settlement as the government may make.³ By espousing a claim of its national for injuries inflicted by a foreign state, the claimant government, acting in its sovereign capacity, makes the claim its own and therefore acts neither as agent nor trustee for the claimant.⁴ The government is merely the channel of international communication. Before an international commission, the claimant is ordinarily the nation on behalf of its citizen,⁵ for the treaty or protocol creating the commission is always an act between state and state.⁶ All claims urged by a nation are technically national; but there is a manifest distinction between claims founded upon an injury to the whole people and those based upon an injury to a particular citizen. Nevertheless, legally, it is unquestionable that the state is the real party in interest, and that the individual claimant has no legally en-

¹ *Del Rio (Mexico) v. Venezuela*, Feb. 26, 1903, Ralston, 880, 886; *Fabiani (France) v. Venezuela*, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 81, 132; *Great Western Ins. Co. v. U. S.*, 19 Ct. Cl. 206, 217.

² *Boynton v. Blaine*, 139 U. S. 306, 323; *La Abra Silver Mining Co. v. U. S.*, 175 U. S. 423; *Frelinghuysen v. Key*, 110 U. S. 63; *Russia v. Turkey*, Hague Court of Arbitration, July 22, Aug. 4, 1910, 7 A. J. I. L. 178, and *Ruzé* in 15 R. D. I. (n. s.) 357.

³ See Mr. Adams in Amer. St. Pap., For. Rel., IV, 704.

⁴ *The Great Western Ins. Co. v. U. S.*, 19 Ct. Cl. 206, 216-218, and 112 U. S. 193; *La Abra Silver Mining Co. v. U. S.*, 29 Ct. Cl. 432, 510; *Rustomjee v. The Queen*, L. R. 1 Q. B. 487, L. R. 2 Q. B. 69; *Anzilotti* in 13 R. G. D. I. P. (1906), 308. See Brief of U. S. Solicitor in *Reid v. U. S.*, Sen. Misc. Doc. 140, 35th Cong., 1st sess., 62, and decision of Court of Claims in support. *Meade v. U. S.*, Ct. Cl. Rep., H. R. 226, 36th Cong., 1st sess., 38, 50.

⁵ *Miliani (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 762. But see Metzger (Germany) *v. Venezuela*, *ibid.* 579 (*dictum*) to effect that a claim is not that of a nation but of an individual.

⁶ *Frelinghuysen v. Key*, 110 U. S. 63.

forceable control over the claim, either in its presentation or in the distribution of any award which may be made.¹

That a diplomatic claim is purely a matter between state and state is evidenced by the fact that the government may deal with it independently of the will of the claimant. The government's control over the claim, as will be more fully observed hereafter,² is absolute, and in the United States this control is vested in the Executive free from interference by the courts or by the citizen who beneficially owns the claim.³

As will be seen more fully hereafter, the government may dispose of the claim in any manner it deems expedient, without consulting the claimant's wishes. The individual, however, cannot, on principle, by his waiver of the right to demand indemnity, estop his government from prosecuting a claim for the offense to the state in the person of its citizen.⁴

When the government presents a claim diplomatically, the defendant state has the right to rely upon the good faith of the claimant government as to the *bona fide* character of the claim and of the citizen on whose behalf it is presented. The foreign government may properly assume that the claim has received thorough examination and that the claimant government is convinced of its justice. This is in a measure a protection against the presentation of fraudulent claims. It is indeed the duty of a government never to use its powers so as to enable a citizen to accomplish a wrong against another state, and the duty of good faith is laid equally upon the citizen. If at any period of the proceeding the claimant government discovers that the claim cannot be honorably or honestly pressed, it is not only its right but its duty to drop the claim, and if already paid by the foreign government, to

¹ *Infra*, § 152. See also ruling on Necessity for personal appearance (U. S.) *v.* Venezuela, Dec. 5, 1885, Opinions, 25, and Mr. Frelinghuysen, Sec'y of State, to Messrs. Mullan and King, Feb. 11, 1884, Moore's Dig. VI, 1016. While the respective agents and counsel before an international commission represent, not the claimants, but their respective governments, permission is occasionally granted by the government to the counsel of the claimant to appear before a commission.

² *Infra*, § 144 *et seq.*

³ *Infra*, § 143. The extent of the power of the courts to control executive action in the distribution of awards is discussed *infra*, § 154.

⁴ *Infra*, p. 372, and especially Jencken claim *v.* Spain, *contra*.

return the indemnity received.¹ This is a direct result of the responsibility for good faith assumed by the government in the presentation of a claim, and it has been invoked even where claims were submitted to arbitration admittedly without previous examination as to their merits.²

§ 140. Effect of National Character of the Claim.

The presentation of a claim for injury to a citizen being a transaction between sovereign and sovereign, it follows that the settlement or adjudication of the claim is in its nature a matter of international law and procedure, and that it is confined to the determination of the validity and amount of the claim as between the two sovereigns, and does not extend to the determination of questions regarding the private ownership of the indemnity.³

Since the claim is national in character, the indemnity fund received in payment of the claim is a national fund. The sum must be paid to the claimant government and receipted for by the appropriate government official. It does not become the property of the individual claimant, either as legal owner or cestui que trust, until his own government has paid it over to him.⁴ The government does not hold the fund either as an agent or trustee for the claimant,⁵ except in the larger

¹ The United States has abandoned claims for fraud at various stages of the proceedings (Moore's Dig. VI, § 1057) and has refunded indemnities received upon claims found to have been fraudulent. See *Frelinghuysen v. Key*, 110 U. S. 63, 74; *La Abra Silver Mining Co. v. U. S.*, 175 U. S. 423, 458. For a more complete discussion of this matter, see *infra*, § 147.

² Circular of Sec'y of State Fish, Feb. 23, 1870, in the matter of the presentation of claims to the U. S.-Mexican commission of 1868, Moore's Arb. 1312. The Weil and La Abra awards paid by Mexico to the U. S. were found to have been fraudulent, and were refunded to Mexico by Act of Congress. Message of the President, Dec. 3, 1900, Sen. Doc. 231, pt. 3, 56th Cong., 2nd sess., 356-358.

³ Opinion by the Solicitor for the Dept. of State, *In re* the distribution of the Alsop award, Washington, 1912, pp. 14-15 and *infra*, p. 382.

⁴ Thus Haiti was held not to have complied with its duty of paying a claim to the U. S. government when, without authorization of the American legation, it deposited funds in a Haitian bank to the order of the legation, the funds being attached by a creditor of the individual claimant. Haiti was not released from its debt by payment to the bank. *Richard Allen's case*, For. Rel., 1895, 814-817. See also payment of Delagoa Bay award, deposited in British Bank, For. Rel., 1900, 845-849.

⁵ See, however, Act of Congress, Feb. 27, 1896, 29 Stat. L. 32, and *infra*, § 155.

sense that every public functionary is clothed with a trust. There is no necessity therefore of having the claimant's approval of a settlement, or of having his receipt pass between the two governments.¹

No individual claimant has, as a matter of strict legal or equitable right, any lien upon the fund in the hands of the Executive.² There is, however, a certain moral obligation to the state which has paid the indemnity, and to the individual claimant for whose benefit it has been received, to bestow the fund in the manner intended by the defendant government.³

§ 141. Varying Effects of Merger of Different Classes of Claims.

In any international reclamation arising out of an injury inflicted upon an American citizen, the private claim becomes merged in the public demand, the injury to the state, in the person of the citizen, becoming in theory the subject of complaint. The government's complete control over the claim, and the absence of any character of agency or trust in the government's demand or of any legally enforceable right of the individual to the whole or a distributive share of the proceeds received by his government from a foreign nation, does not becloud the fact that there may be differences, depending upon the private or public character of the citizen, in his moral right to the indemnity claimed and collected by his government. For example, if the citizen is a private individual injured in his person or property, it is not conceivable, in the absence of any censurable conduct on his part, and notwithstanding the absence of legal obligation, that the government will fail to make him the beneficiary of any indemnity it may receive—with a possible deduction for expenses. Moreover, by an assignment

¹ Two receipts usually pass, one from the claimant to the debtor government, the other from the individual claimant to his own government. Claim of Frederick Mevs *v.* Haiti, For. Rel., 1893, 371-382. Settlement of claim of U. S. and Venezuela Co. (U. S.) *v.* Venezuela, protocol of Aug. 21, 1909, For. Rel., 1909, 624.

² Williams *v.* Heard, 140 U. S. 529; U. S. *v.* Weld, 127 U. S. 51; Rustomjee *v.* The Queen, 2 L. R., Q. B. D. (1876), 69.

³ Anzilotti in 13 R. G. D. I. P. (1906), 308; Williams *v.* Heard, 140 U. S. 529 (*dictum*). Sometimes the claimant government expressly agrees with the debtor government to devote a certain part of the sum to the cancellation of specific debts. Minister Russell to the Venezuelan Min. of For. Aff., Sept. 9, 1909, For. Rel., 1909, 628.

of his claim to a person of another nationality or by his abjuring his allegiance, such a claim would be deemed to lose its American nationality and the government its right and interest in pressing for settlement.

On the other hand, when the individual in whose person the state is injured occupies a public position, such as consul, ambassador or sailor on a public vessel, the national wrong becomes greater and the private wrong (and the resulting right to redress) apparently less. The national injury will survive any assignment or transfer of the private claim to alien ownership. The individual's right to indemnity can hardly be considered as a claim against a foreign country but rather as a request upon his own government for its humane consideration of his sufferings. In such cases, notwithstanding the fact that awards and allowances have been made on numerous occasions to individual consuls or sailors ¹ in whose persons an affront to the nation had been committed, and the fact that the government frequently demands pecuniary reparation for the injuries sustained by such public servants, it is not believed conformable to the public interest that the government in negotiating for the settlement of a national political grievance should be embarrassed by private claims of its citizens growing out of the subject of controversy.² While the private injuries may constitute an element in the measure of damages, it is not the principal item of damage, and any sum paid to the individual as a result of a diplomatic settlement may be regarded as a pure gratuity.

Another example of (attempted) merger of the private and public interest in an international claim was exposed in the claim of the seamen of the U. S. S. *Maine* against the United States (as the assignee of

¹ Helmsman on U. S. S. *Water Witch* (U. S.) v. Paraguay, 1855, 1859, Moore's Arb. 1486, 1494; U. S. v. Japan, 1863, part of indemnity being paid to seamen on the *Wyoming*, treaty of Oct. 22, 1864, Malloy's Treaties, I, 1011; U. S. v. Chile, sailors of U. S. S. *Baltimore* assaulted in Valparaiso, For. Rel., 1892, 57 *et seq.*; France v. U. S., killing of French seamen in Toulon Harbor, May 1, 1834, Act of June 28, 1834, 4 Stat. L. 701; Great Britain v. Japan, killing of British sailors at Yedo in 1862, Dipl. Cor., 1863, II, 989; France v. Japan, 1868, killing of seamen of frigate *Venus* and corvette *Dupleix*, Dipl. Cor., 1868, I, 698; Assault upon sailors of U. S. S. *Columbia* and *Bufalo* in Panama, 1906 and 1908; settled by indemnity, For. Rel., 1909, 479, 491.

² Private citizens may by the bounty of Congress receive the benefits of an indemnity paid for a national grievance, *e. g.*, the *Alabama* claims, and the Acts of Congress of 1874 and 1882.

Spain) before the Spanish Treaty Claims Commission, arising out of the injuries sustained by the seamen when that vessel was blown up, under an allegation of responsibility of Spain, in the harbor of Havana in 1898. The claim was dismissed by the Commission on the ground that individual claims do not arise in favor of the officers and seamen of a ship of war who receive, in the line of duty, injuries to their persons for which a foreign government is responsible; and that the claim being wholly national, all injuries to officers and seamen are merged in the national injury, their only relief being the gratuitous bounty of their own government.¹ This decision places these claims in the same class as the cases discussed in the preceding paragraph. A better reasoned ground of decision is contained in the concurring opinion of Commissioner Maury who took the position that the treaty of peace itself put an end to and extinguished all causes of difference between the belligerents.²

§ 142. National Claims which Survive Private Settlement.

From the foregoing discussion of the relation between the private and the public injury it may be concluded that there are two classes of injuries to the state: first, those which *directly* affect the state, being inflicted either upon the sovereign himself or his representatives, or upon the flag, public vessels or public property of the nation, out of which injuries no private claim can arise, and secondly, those which *indirectly* affect the state, being inflicted upon its citizens.

This second class of claims, in which our interest is specially engaged, may be subdivided into two categories. In the first category are wrongs which always injure the sovereign, because by the act complained of the citizen has been rendered unable to perform his duties toward the state, *e. g.*, his duties of loyalty, the performance of military service, or the payment of taxes. If the citizen is restored to his rights or former condition, thus enabling him to perform his duties as before, the state is no longer injured. But if not restored to his rights, *e. g.*, if he is killed or badly wounded, disabling him from the performance of his obliga-

¹ *McCann v. U. S.*, No. 30, Opinion of the Commission delivered March 6, 1902, Opinion by the President of the Commission.

² Concurring opinion of Mr. Commissioner Maury, p. 4.

tions to his country, the independent right of the state to demand compensation survives any denationalization of the individual's claim by assignment or transfer by operation of law. In the second category of cases the injury to the citizen may or may not result in an actionable injury to the state, depending upon

(a) whether or not the citizen may be put in *statu quo* by the authorities of the state of residence, and

(b) whether or not the particular acts complained of are so flagrant as obviously to be intended as an affront to the state.

If the citizen is placed in *statu quo*, no affront to the state having been involved, the injury to the state is not such as will survive restitution or compensation to the citizen. This class of acts includes personal indignities toward citizens who are not officials of the government, and injuries to the property rights of citizens.

PROTECTION DISCRETIONARY WITH THE EXECUTIVE

§ 143. Discretion Uncontrollable by Courts.

As already indicated, the Executive, in the person of the Secretary of State, has a practically unlimited discretion in determining whether protection should be extended or a claim presented to a foreign government in a given case. The only possible limitation upon the free exercise of the Secretary's judgment arises out of the courtesy due to the will of Congress, expressed occasionally in the form of a joint resolution requesting the President to call the attention of a foreign government to an injustice committed against an American citizen or empowering him to take effective measures to obtain redress from a foreign state on behalf of an injured citizen.¹ The courts and the Attorney General have recognized that the Secretary of State must

¹ Such resolutions in the cases of Helen M. Fiedler and of A. Bolten and G. Richelieu are printed in S. Doc. 231, 56th Cong., 2d sess. (compilation of reports of committees on foreign relations), pp. 325 and 327. The recommended resolutions in these cases do not appear to have been passed. See also resolution approved June 2, 1858 (11 Stat. L. 370) authorizing use of necessary force in the case of the *Water Witch v. Paraguay*; Joint resolution 28 of June 19, 1890 (26 Stat. L. 674) in *Venezuelan Steam Tr. Co. claim*, Moore's Dig. VII, 112; J. Res. 30, Mar. 2, 1895 (28 Stat. L. 975) in *Mora claim v. Spain*, For. Rel., 1895, II, 1160, 1163. See also memorandum by the Solicitor of the Dept. of State, "Right to protect citizens in foreign countries by landing forces," Washington, August, 1912, Revised ed., pp. 37-38.

decide, according to his own discretion, whether he will press the claim of an American citizen upon a foreign government.¹ As in the case of all extraordinary legal remedies, the employment of the remedy of diplomatic protection is within the discretion of the granting authority. The courts, moreover, have disclaimed any power, by mandamus or otherwise, to compel the Secretary of State to present and urge a claim of a citizen of this country against a foreign government, taking the ground that such a function is political in its nature and within the province of the Executive.² The writ of mandamus, indeed, cannot issue to direct or control the head of an executive department in the discharge of an executive duty, involving the exercise of judgment and discretion.³

That the exercise of the protective function from its very inception is discretionary is evidenced by the fact that the Secretary of State is empowered by Congress to refuse, in his discretion, to issue a passport.⁴ Thus the Secretary might decline to issue a passport to an American citizen who intends to accomplish a criminal purpose or to use it in the protection of an illegitimate enterprise.⁵ Diplomatic protection or the support of a claim may in any case be denied as a matter of public policy.⁶

The exercise of the Secretary's discretion is most frequently illustrated in the presentation and pressure of foreign claims and the negotiations incidental thereto. He may, for example, refuse to present a claim at all.⁷ In pursuance of his right to investigate the merits of a claim and the claimant's title to protection, he may and has often

¹ U. S. v. La Abra Silver Mining Co., 29 Ct. Cl. 432; Atty. Gen. Black in 9 Op. 338 (Perkins' claim v. Russia); Moore's Dig. VI, 695.

² U. S. ex rel. Holzendorf v. Hay (1902), 20 D. C. App. 576, 578.

³ U. S. ex rel. Boynton v. Blaine, 139 U. S. 306 (in connection with distribution of award), and Marbury v. Madison (1803), 1 Cranch, 137, 166; Brown v. Root, 18 D. C. App. 239, 242. See also W. W. Lucas in Juridical Review, October, 1912, 185 *et seq.*, Poujade v. l'Etat (France), Sirey, 1906, 3, 158, and Laferrière, Traité de juridiction administrative, Paris, 1896, II, 48.

⁴ R. S., § 4075. *Infra*, p. 508.

⁵ For. Rel., 1907, II, 1079 *et seq.* *Infra*, p. 495.

⁶ Moore's Dig. VI, § 974. See also Mr. Seward, Sec'y of State, to Mr. Otterbourg, Aug. 8, 1867, Dipl. Cor., 1867, II, 445.

⁷ Mr. Bayard, Sec'y of State, to the President, Jan. 20, 1887, For. Rel., 1887, 607 (Pelletier case). See also Moore's Dig. VI, § 973.

declined to present speculative, exorbitant or fraudulent claims, claims based upon acts against public policy or the laws of the United States or international law, or claims in which the claimant is considered guilty of censurable conduct or otherwise not entitled to diplomatic assistance.¹

The discretionary power of the Executive in the presentation of diplomatic claims, and in respect of the time, extent and means of pressure enables the Department of State to exercise the fullest control over claims, a power to be examined in detail presently. For example, it is not the practice of the Department to present claims arising out of the arrest and detention for military service of naturalized American citizens who return to their native country.² Contract claims are under ordinary circumstances not presented diplomatically, although the use of the unofficial good offices of the American diplomatic representative is usually authorized.³ Palmerston and other British secretaries of State for Foreign Affairs have considered the enforcement of claims arising out of unpaid national bonds of foreign states a matter of governmental discretion.⁴ Claims arising out of certain torts, of an especially flagrant and serious nature, such as murder, mob violence, etc., are usually pressed at once by the United States and other governments, without requiring the exhaustion of local remedies.⁵ The Department, moreover, has the right to prosecute a claim against a foreign government either in its original form, to modify it, or to effect a compromise without the permission of the claimant, and without rendering itself responsible to the claimant by reason of the exercise of such discretionary powers. In the protection of the citizen, the government's authority and powers are plenary. The citizen is bound by its action, and must accept the measure of protection which the Executive officials in the exercise of their sound discretion deem it proper to afford.

¹ *Infra*, Part IV, ch. III, § 337 *et seq.*

² Mr. Adee, Acting Sec'y of State, to Mr. Harris, Sept. 20, 1899, For. Rel., 1899, 75.

³ *Supra*, § 113. In *De Witt (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3466, Thornton, Umpire, considered that he had the same discretionary right to entertain a contractual claim as was possessed by the claimant government.

⁴ *Supra*, p. 314.

⁵ *E. g.*, Lienchou riots in China, 1904; Grenada massacre of Oct. 13, 1856; *Fretz (U. S.) v. Colombia*, Mar. 8, 1886, Moore's Arb. 2560 (Panama riot of April 15, 1856).

CHAPTER III

GOVERNMENT CONTROL OVER CLAIMS

§ 144. Power to Settle, Compromise, Release or Abandon Claim.

It will have become apparent from what has gone before that a necessary corollary of the government's discretion in the presentation of claims is an unlimited control over them in the conduct of diplomatic negotiations. The government is the sole judge of what claims it will enforce, and of the manner, time, means and extent of enforcement. It may refuse to present a claim at all. After espousal of a claim, the government may abandon it, submit it to arbitration or make any other disposition thereof which it deems expedient in the public interest, *e. g.*, the government may compromise it, or release it, without compensation or for a consideration of benefit to the general public.

The government's power to settle the claim of its citizen against a foreign country is practically unrestricted.¹ Its only limitation lies in the moral and equitable duty to compensate the citizen whose claim it negotiates away for a consideration of benefit to the public generally rather than to the individual claimant.² The exercise of this power of dealing at will with the claims of its citizens against foreign states is illustrated by numerous executive agreements for the settlement of claims,³ and by treaties submitting claims to arbitration under conditions of various kinds. Thus, claims may be absolutely barred from recovery which are not presented to arbitration within a definite time,⁴ or which, under a specific protocol, the contracting governments do

¹ Moore's Dig. VI, § 1055.

² *Infra*, § 149.

³ *E. g.*, Claims convention between U. S. and Brazil, Jan. 27, 1849, Malloy's Treaties, 1910, I, 144; 39 St. Pap. 42.

⁴ *E. g.*, art. 5 of the convention between U. S. and Venezuela, Apr. 25, 1866, Malloy's Treaties, II, 1857. See also Moore's Dig. VII, § 1080; and compromis of Dec. 18, 1913 for settlement of claims between France and Turkey, 41 Clunet (1914), 1444, 1445.

not submit to arbitration.¹ The government has the right and power to fix upon the time, manner and place of payment, and the claimants must bear any incidental loss on account of exchange or interest.²

Inasmuch as the government is under no legal obligation to any citizen to prosecute his claim against a foreign country, but is guided solely by the public interest, considerations of public policy and upright dealing between states may warrant the abandonment of a claim. For example, if at any period of the proceedings, the government becomes satisfied of the falsity or injustice of a claim of its citizen against a foreign state it may abandon all further prosecution thereof. This power has been exercised by the United States even after an award of an arbitral tribunal in favor of an American claimant, the government declining to enforce an award which newly-discovered evidence indicated as having been erroneous.³ Similarly, the award of the domestic commission of 1849, established under the treaty with Mexico of 1848, was set aside by authority of Congress in the Gardiner case,⁴ and the awards of Umpire Thornton of the United States-Mexican Commission of 1868 were reopened in the Weil and La Abra claims,⁵ subsequently discovered to have been fraudulent, and indemnities already paid by Mexico and in part transmitted to claimants were refunded to Mexico by the United States.⁶ The Secretary of State, in the case of the *Caroline*, returned to Brazil, against the claimant's protest, an indemnity which had been paid by Brazil on a fraudulent claim.⁷

Pecuniary claims may not only be lost by abandonment of the gov-

¹ *E. g.*, art. 2 of the agreement between U. S. and Great Britain, Aug. 18, 1910, Malloy's Treaties (suppl. 1913 by Charles) III, 51.

² See *e. g.*, the unratified convention of Jan. 30, 1843 with Mexico for payment of awards under convention of April 11, 1839, 32 St. Pap. 1234. Mr. Uhl, Acting Sec'y of State, to Mr. Woodruff, May 25, 1894, Sen. Doc. 233, 55th Cong., 2nd sess., 40.

³ *Pelletier (U. S.) v. Haiti*, and *Lazare (U. S.) v. Haiti*, May 24, 1884, Moore's Arb. 4768, 1749, 1779, 1800. Claims submitted to an arbitral commission have in several instances been withdrawn before a decision was rendered. Ralston, J. H., *International arbitral law*, 163.

⁴ Moore's Arb. 1255.

⁵ *Ibid.* 1324 *et seq.*

⁶ *Infra*, p. 375.

⁷ Sen. Rep. 1376, 40th Cong., 1st sess.

ernment, but certain forms of international action may serve to extinguish the claim. For example, war between the claimant and defendant countries would extinguish any private claims not provided for in the treaty of peace, at least so far as concerns those which were a direct cause of the war.¹ Again, if a claimant suffers injury in a transaction for which his government assumes responsibility, his claim becomes merged in the diplomatic settlement of the political question involved.² In all cases, the international settlement of a claim by agreement of the two governments involved, estops the claimant from all right to again demand any redress from the foreign country against which his claim arose.³

When one of several states may be considered pecuniarily liable for a violation of international law to the detriment of a citizen, his government may decide as to which state it will hold responsible. This rule was applied to several cases of wrongful capture by French privateers of American vessels taken into neutral ports of Spain, Netherlands and Denmark and there condemned. France was considered liable for the illegal capture, and the neutral nation for permitting the infringement of its obligation of neutrality toward the United States. It was held by the Court of Claims in a French Spoliation case that when the United States elected to hold Spain liable for the illegal condemnation, its rights against France were thereby lost,⁴ and the act of the government was held binding upon the citizen.⁵ Denmark appears

¹ Moore's Dig. VI, § 1053; *White (U. S.) v. Mexico*, Mar. 3, 1849, Opin. 287 (not in Moore).

² *McLeod (Gt. Brit.) v. U. S.*, Feb. 8, 1853, Moore's Arb. 2419, 2422. See also *McCann v. U. S.*, No. 30 (The Battleship *Maine* cases, before the Spanish Tr. Cl. Com.) in which Commissioner Maury (p. 2 of his opinion) held that art. VII of the treaty of peace of Dec. 10, 1898 put an end to these claims as individual claims. Final Report, May 2, 1910, p. 11 and Opinion of the Commission.

³ *Aguirre (Mexico) v. U. S.*, July 4, 1868, Moore's Arb. 2430-2437; *Houard (U. S.) v. Spain*, Feb. 12, 1871, *ibid.* 2428. Art. III of convention between Mexico and China, Dec. 16, 1911, for payment of indemnity by Mexico for mob violence against Chinese during revolution of 1910. Suppl. to 8 A. J. I. L. (1914), 148.

⁴ *Whitney, Adm., v. U. S.*, Act of Jan. 20, 1885, 27 Ct. Cl. 122; *The Apollo v. U. S.*, 35 Ct. Cl. 411. By art. 9 of the treaty of Feb. 22, 1819 with Spain (Malloy's Treaties, 1910, II, 1654) the U. S. had, for a consideration, released Spain from liability for these condemnations, and agreed to make satisfaction to its own citizens. *Infra*, p. 379.

⁵ *The Apollo v. U. S.*, Act of Jan. 20, 1885, 35 Ct. Cl. 411.

to have been regarded as liable for condemnations of American prizes in her territory.¹ For similar acts in Dutch territory during the Napoleonic control of Holland, France and not Holland was held liable by the commission under the treaty of July 4, 1831,² especially as Holland appeared to have been released from responsibility by the United States. In the case of a seizure made by French privateers in Swedish waters, a protest by the United States to Sweden and the absence of any complaint against France was considered an election to hold Sweden liable.³ The fact that the United States had regarded France and not Spain as liable for the condemnation of vessels taken into Spanish ports, when the prize proceedings were conducted in French territory, was held by the Court of Claims to release Sweden and the Netherlands from liability arising out of similar circumstances.⁴

With the power to refuse to present the claim, or to abandon it at any time after its espousal, the government has necessarily, as an incident of its control over it, the right to modify or reduce the claim in amount⁵ and to accept such settlement in amount or kind as may in its opinion appear reasonable under the circumstances. The negotiations for settlement, therefore, are usually conducted between government and government.⁶ When the right to negotiate is granted to

¹ Convention of March 28, 1830, Moore's Arb. 4549, 4563; Amer. St. Pap., For. Rel. III, 384, 505.

² Moore's Arb. 4473, quoting Kane's notes.

³ The *Reliance v. U. S.*, Act of Jan. 20, 1885, 41 Ct. Cl. 67. The fact that the owners filed a claim against Sweden was corroborative evidence of the election of Sweden. In theory, the government might have disregarded claimant's election and looked to France.

⁴ The *Happy Return v. U. S.*, Act of Jan. 20, 1885, 37 Ct. Cl. 262, 268. The U. S. was regarded as having overlooked the abuse of the right of asylum by these neutral countries.

⁵ See, *e. g.*, the interesting case of the *Lautardo* (Chile) *v. Colombia* in which, after a settlement had been agreed upon and partly liquidated, the payment of the unpaid balance was in part waived by Chile on the equitable ground that Panama, originally responsible for the injury, no longer belonged to Colombia. For. Rel., 1907, I, 293. See also Labaree claim *v. Persia*, For. Rel., 1906, 1208; and Mather's claim (Gt. Brit.) *v. Tuscany*, 1852, 42 St. Pap. 474, 495.

⁶ *E. g.*, Claims of citizens of U. S. for deportation from South Africa. Mr. Hay, Sec'y of State, to Mr. White, Oct. 26, 1901, For. Rel., 1901, 216. Settlement of Emery claim *v. Nicaragua*, Sept. 18, 1909, For. Rel., 1909, 464; Great Britain and Chile, Sept. 29, 1887, 78 St. Pap. 774; Etzel (U. S.) *v. China*, Mr. Loomis, Acting Sec'y of State, to Mr. Conger, July 15, 1904, For. Rel., 1904, 176.

the citizen, as it occasionally is, the government must express its approval of the settlement before it may be considered as final, and the claim withdrawn from the files of the Department.¹

It not infrequently happens that a form of settlement satisfactory to the government is quite unsatisfactory to the claimant. For example, the government may accept an apology from a foreign country or accept the punishment of the wrongdoing officer for the false arrest of an American citizen as a sufficient reparation for the injury, notwithstanding the demand of the citizen for pecuniary indemnity.² In Waller's claim against France, the claimant's release from imprisonment and pardon of his offense, on condition that the United States should make no claim on his behalf was regarded by the government as a satisfactory adjustment of the case, notwithstanding claimant's protest.³ It is evident, therefore, that the citizen, having made his claim the subject of international negotiation, is bound by a settlement effected and considered satisfactory by his government. On the other hand, as will be observed presently, a direct settlement between the wrongdoing government and the citizen or his waiver of the right to make a claim in no way affects the right of his government to demand such indemnity as it may consider the offense to warrant.

The effect upon international commissions of the previous diplomatic negotiations connected with the prosecution or adjustment of a claim depends very largely upon the terms of the protocol under which the commission acts. As a general principle, arbitral tribunals have refused to be bound by conclusions and opinions reached by the political

¹ Scandella claim *v. Venezuela*, For. Rel., 1898, 1137-1147; S. S. *Haitian Republic claim v. Haiti*, S. Ex. Doc. 69, 50th Cong., 2nd sess., 171, 241; Panama Star and Herald claim *v. Colombia*, For. Rel., 1899, 232. A private settlement was considered a bar to an international claim in *Bours (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2430.

² St. Bris' claim *v. Belgium*, For. Rel., 1901, 17; Torrey (U. S.) *v. Venezuela*, Feb. 17, 1903, Ralston, 162, Morris' Rep. 331, quoting from letters of Sec'y Evarts and Sec'y Bayard. Paul, Commissioner, allowed Torrey \$250.

³ For. Rel., 1895, 258. If the Department considers the offer of a foreign country to a claimant fair, it will, of course, decline to press his demand for a larger sum. See also claim of Schooner *B. L. Allen* (U. S.) *v. Mexico*, July 4, 1868, Moore's Arb. 2430, note; and Crosswell's claim (Gt. Brit.) *v. Haiti*, 1887, 78 St. Pap. 1353.

department of the government concerning the international responsibility of foreign states, or to consider as necessarily valid claims those which the claimant government had officially espoused and pressed.¹ As in private law, an offer of settlement or compromise made in diplomatic negotiations could hardly be construed by an international tribunal as an admission of the justice of the claim or of international liability.² Nor does an offer to accept a reduced sum bind an arbitral tribunal to limit its award to that amount.³

§ 145. No Obligation to Consult Claimant.

While it frequently happens that during the course of a diplomatic adjustment of a claim the Department of State consults the claimant in the various stages of the negotiations and usually endeavors to arrange a settlement satisfactory to the claimant,⁴ there is no legal obligation of any kind to secure the claimant's sanction or assent to any steps undertaken.⁵ Indeed, as already observed, disposition may be made of the claim as expediency dictates, without his assent or even against his protest.⁶

The government may prosecute a claim arising out of an injury to a citizen notwithstanding the fact that the citizen declines to make

¹ Opinion of Spanish Treaty Cl. Com., Special Rep. of W. E. Fuller, 24; Hooper v. U. S., Act of Jan. 20, 1885, 22 Ct. Cl. 408.

² *Constancia, Good Return and Medea* (U. S.) v. Colombia, Feb. 10, 1864 (Bruce, Umpire), Moore's Arb. 2742. In this case, it was held that the mere presentation of a claim by a diplomatic agent is not binding on his government, *ibid.* 2742. Nor is his assurance that a claim against the U. S. would be paid. *Meade v. U. S.*, 9 Wall. 691.

³ The *Canada* (U. S.) v. Brazil, Mar. 14, 1870, Moore's Arb. 1733, 1745; La Fontaine, 133.

⁴ Mr. Olney, Sec'y of State, to Mr. McKenzie, Apr. 24, 1896, For. Rel., 1896, 492 (Claim of Hydrographic Commission of the Amazon v. Peru); Claim of White v. Mexico, Mr. Ryan to Mr. Blaine, May 20, 1890, For. Rel., 1890, 635. The protocol of arbitration may occasionally show that the claimant has consented to the arbitration. May (U. S.) v. Guatemala, Feb. 23, 1900, For. Rel., 1900, 657; Malloy's Treaties, I, 871-872.

⁵ Mr. Olney, Sec'y of State, to the Attorney-General, Oct. 7, 1895, Moore's Dig. VI, 1021.

⁶ *Supra*, p. 366. Brief of Solicitor for U. S. in case of Samuel C. Reid *et al.* (Brig General Armstrong) v. U. S., before Court of Claims, Sen. Misc. Doc. 140, 35th Cong., 1st sess., 38-40. Opinion of Judge Blackford, *ibid.* 111-113.

any complaint¹ or renounces his right to an indemnity.² Nevertheless, unless the offense is particularly flagrant or may be deemed a national affront, the individual's waiver of a right to indemnity weakens the moral, if not the legal, right of his government to demand reparation, and the government may well consider itself justified in desisting from pressing a claim waived by the individual who actually sustained injury.³ Arbitral tribunals have regarded a private waiver⁴ of a claim as a bar to an international reclamation.

It will be seen hereafter⁵ that the individual cannot renounce or contract away the right of his government to intervene in his behalf. While he may renounce a personal right or privilege, he does not represent the government and therefore is incompetent to renounce a right, duty, or privilege of the government. The principle may be supported on the theory that the wrongful act is a tort and crime combined, each giving rise to an independent right of action.

§ 146. Power to Determine Opportunity for Pressing Claim.

Not only can the government in its discretion estimate the damage sustained by its citizen and determine upon the proper amount and items for which an international claim may justly be prosecuted, but it may decide for itself upon the appropriate time for advancing the claim. Conditions of various kinds have arisen from time to time which have led the Department of State merely to place on file claims against certain countries, until in its opinion a propitious moment for their pressure presented itself. At the present time, for example, the Department probably considers it useless to press claims against Mexico.

¹ This happened in certain cases of missionaries murdered in the Lienchou riots, 1904.

² British Vice-Consul Magee in 1874 expressly renounced all indemnity for an outrage against him committed by a local governor in Guatemala, on the ground that his personal interests would suffer thereby. Notwithstanding the renunciation, and a salute to the British flag by Guatemala, Great Britain pressed and collected a claim for £10,000 indemnity. 65 St. Pap. 875, at 900; Baty, 171.

³ Jencken's claim (Gt. Brit.) *v.* Spain was therefore dropped by Great Britain. Mr. Hammond to Mr. Tomkins, Nov. 2, 1870, 62 St. Pap. 1003; Baty, 156.

⁴ Jarr and Hurst (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 2713 (it was regarded as a private settlement of the claim).

⁵ *Infra*, p. 810.

Other considerations operate to prevent this government from settling by arbitration its numerous claims against Spain. The various attempts to obtain the signature by Spain of a protocol of arbitration have come to naught upon the refusal of the United States to submit the East Florida claims to arbitration, a refusal based apparently rather upon traditional repetition and fear of the Senate's declining to ratify an agreement to arbitrate the claims than upon the justice of the American position under the treaty of 1819. In many cases, the financial weakness of the defendant state or its political instability has led the Department to abstain from pressing the claims of its citizens. Strained diplomatic relations furnish a good ground for declining to present pecuniary claims, an act which might only aggravate a delicate political situation. The pressure of a purely legal claim, therefore, is subject to every political consideration which affects the sensitive machinery of diplomacy, with the result that many meritorious claims have rested for years, unredressed, in the archives of the Department of State and in the Foreign Offices of other governments. There are few stronger arguments for the submission of international pecuniary claims to the adjudication of a permanent international tribunal.

§ 147. Government's Power to Renounce Indemnity.

It has already been observed that the government may abandon a claim against a foreign state whenever it becomes convinced of the fraud or disqualification of the claimant or of the falsity or injustice of the claim.¹ A claim may also be renounced or surrendered for reasons of public policy, and the government escape legal liability, for whatever the equitable considerations in favor of just compensation to an individual whose private claim is relinquished for a public advantage, the government must be the sole judge of the means it is warranted in using in the pressure of a claim; and if it considers that the public interest does not justify a resort to certain measures, *e. g.*, war, it may sacrifice the private interest for the public good.² The government is not often confronted with such an alternative, for ar-

¹ *Supra*, p. 367. *U. S. v. La Abra Silver Mining Co.*, 29 Ct. Cl. 432, 175 U. S. 423; *Frelinghuysen v. Key*, 110 U. S. 63; *Moore's Dig.* VII, § 1083.

² See extract from the *Memoirs of J. Q. Adams*, in *Moore's Dig.* VI, 1026.

bitration has fortunately offered a means of disposing of many claims which prove impossible of settlement by diplomatic negotiation. Numerous claims, however, might be mentioned in which a foreign government, denying its liability in the premises, has refused to submit the issue to arbitration, and the claimant government, rather than resort to force, with its necessary consequences, has felt itself constrained or considered it preferable to drop the matter and abandon the claim. The power of the government, by treaty or otherwise, to renounce or relinquish the claims of its citizens, is indisputable.¹ The circumstances under which the government, by reason of such renunciation of the claims of its citizens, may be deemed to incur liability to the individual claimant, will be considered presently.

The complete control of the government over the claim of its citizen does not cease when an award upon it has been made by an arbitral tribunal. This fact has been illustrated in several cases, where awards which the government regarded as having been unjustly obtained, were either not collected from the defendant states, or after having been paid, were returned in their entirety. In the case of Lazare against Haiti, Secretary Bayard set aside an arbitral award in claimant's favor on the ground that newly discovered evidence indicated the injustice of the award, and that there were irregularities in the arbitral proceedings and errors in the award.² In the case of Pelletier against Haiti an award in claimant's favor was set aside by Secretary Bayard on the ground that the arbitrator had been mistaken in his jurisdiction and that the claim should have been dismissed, that the claimant was guilty of turpitude, and that the Executive should refuse to enforce

¹ See, *e. g.*, the renunciation of American claims against Spain, treaty of Feb. 22, 1819, art. 9, Malloy's Treaties, II, 1654; *Meade v. U. S.*, 2 Ct. Cl. 224, 9 Wall. 691; Mutual release of claims in treaty of Feb. 17, 1834, art. 3, Malloy's Treaties, II, 1660; Treaty of Dec. 10, 1898 with Spain, art. 7, Malloy's Treaties, II, 1692; Spanish claims against Venezuela, treaty of June 21, 1898 cited in *Corcuera (Spain) v. Venezuela*, Apr. 2, 1903, Ralston, 936; Betancourt, *ibid.* 940; Certain Danish claims against U. S. relinquished in convention of March 28, 1830, Moore's Arb. 4549, 4563; Convention between Russia and Roumania, Apr. 21-May 3, 1882, for relinquishment of claims growing out of war with Turkey (damages caused by passage of Russian armies), 74 St. Pap. 297.

² *Lazare (U. S.) v. Haiti*, May 24, 1884, Moore's Arb. 1749, 1779, 1793, 1800.

an unconscionable award.¹ In both cases, the Department of State declined to collect the awards from Haiti.

In the case of the *Caroline* against Brazil, the United States, by act of Congress, returned to Brazil an indemnity which had been paid to a diplomatic representative of this government, the Attorney-General having advised that Brazil was not internationally liable on the claim.²

In some instances where awards were made in favor of the United States on claims which were subsequently found to have been fraudulent this government has returned to the foreign nation any indemnity it may have paid, and this notwithstanding the fact that a part of the indemnity had already been distributed to the claimants. The most notable cases under this head are the claims of Weil and La Abra Silver Mining Co. against Mexico in which—on what proved later to have been shameless fraud and perjury—awards were obtained from the Umpire of the mixed commission under the treaty of July 4, 1868. After a re-investigation of the cases by the Court of Claims, under the authority of Congress, had established the fraudulent character of both claims, the United States first returned to Mexico the undistributed balance paid on the claims and subsequently repaid the installments already distributed.³ In *Frelinghuysen v. Key*, Chief Justice Waite declared that "the government which has been so imposed on as to prosecute a fraudulent claim is in duty bound to repudiate the act and make reparation to the aggrieved state."

The United States has on several occasions, as a matter of equity or friendship, returned to foreign countries portions of indemnities which, upon allotment to entitled claimants, proved to have exceeded the amount of injury sustained.⁴

¹ *Pelletier (U. S.) v. Haiti*, Moore's Arb. 1749, 1757, 1794, 1800.

² Moore's Arb. 1342, note. Some of the indemnity paid to the diplomatic representative never reached the Treasury, it seems.

³ Moore's Arb. 1324 *et seq.*; Decisions of the Court of Claims in the La Abra case, 32 Ct. Cl. 432, 175 U. S. 423 and in the Weil case, 35 Ct. Cl. 42; Return to Mexico of undistributed balance, For. Rel., 1900, 781-784; Appropriation for repayment of distributed installments, Act of Feb. 14, 1902, 32 Stat. L. 5. The fraudulent award which was set aside in the Gardiner case (Moore's Arb. 1255) was that of a domestic commission.

⁴ Repayment of part of Japanese indemnity fund, Act of Feb. 22, 1883, 22 Stat. L. 421, Sen. Doc. 231, pt. 1, 56th Cong., 2nd sess., 405; Return of part of Chinese

§ 148. Government not Liable for Mismanagement.

The plenary control of the government over a claim of its citizen is demonstrated by the fact that the failure to fulfill the political obligation of diplomatic protection or the mismanagement of the case so as to deprive the individual claimant of redress does not subject the state to any pecuniary liability. Notwithstanding various *dicta* to the effect that the government must either procure redress for its citizens or itself reimburse them,¹ it seems clear that under Anglo-American law no legal liability can attach to the government for failure or negligence in the matter of protection, a principle justifiable either on the theory that a political and discretionary act escapes judicial review and control or on the ground that the government is not liable in tort and cannot be sued without its consent.² In the case of Alfred Benson, a petition to Congress to obtain relief for a failure of the administration of President Fillmore to carry out its assurances of protection to the memorialist in the removal of guano from the Lobos Islands received the support of a Senate committee,³ but appears not to have been favored with an appropriation by Congress.

In French law, the immunity of the government from liability for failure to protect or to secure redress, or for mismanagement of the claim, is based upon the theory of an *acte de gouvernement*,⁴ which escapes judicial review,⁵ or, as Brémond explains it, the absence of any indemnity fund, Act of Mar. 3, 1885, 23 Stat. L. 436; Moore's Arb. 4627, 4637; Sen. Doc. 231, pt. 1, 56th Cong., 2nd sess., 391-393; Remission of part of Boxer indemnity, Joint Res., May 25, 1908, For. Rel., 1908, 64. Such a surplus is not always returned, *e. g.*, Great Britain still retains apparently an undistributed portion of the French indemnity under the conventions of 1815 and 1818, and the United States a small portion of the *Alabama* award.

¹ The Lord Chancellor in *Baron de Bode's case*, 16 L. and Eq. R. 23. Chief Justice Parker in *Farnum v. Brooks*, 9 Pick. 238. See also Rutherford's *Institutes*, Cambridge, 1756, II, ch. IX, § 11, p. 514.

² These questions were exhaustively argued in the cases of the *Brig General Armstrong*, Sen. Misc. Doc. 140, 35th Cong., 1st sess. (in which Congress in 1882 on patriotic grounds voted some \$70,000 to the claimants), and of *R. W. Meade*, H. Rep. 226, 36th Cong., 1st sess. (Court of Claims). See also Atty. Gen. Cushing in 7 Op. Atty. Gen. 239.

³ Sen. Rep. 397, 34th Cong., 3rd sess., 23-24.

⁴ *Supra*, p. 134.

⁵ Laferrière states that it is a constant rule of the Conseil d'Etat to deny the suavity of the state for the refusal of the Minister of Foreign Affairs to support a claim

legal obligation of or individual right to protection, which is a purely political, sovereign and discretionary act, responsibility for which is incurred to parliament alone.¹

The same freedom from judicial control, by mandamus or otherwise, extends to the Executive's discretion in the distribution of awards received from foreign governments,² individual claimants having no lien upon the fund received. Payment by the government to a claimant, however, does not determine the question of ownership, which is then, as between contesting beneficiaries, wholly within the jurisdiction of the courts.³

The abandonment or surrender of a private claim imposes no legal liability upon the state, under any circumstances, it is believed. When, however, a private claim is used as a set-off to obtain certain national advantages an equitable obligation arises to reimburse the individual whose private right has thus been sacrificed for the public good. In a noteworthy decision of the Court of Claims in a French Spoliation case, that Court, under the authority of Congress, translated this obligation into a legal liability, by holding the government responsible to its nationals for the French spoliation claims which had been surrendered to France in exchange for a release from the obligations of the treaties of 1778 and 1788.⁴

against a foreign nation or take any particular measures of diplomatic protection. Laferrière, *op. cit.*, II, 48; Pradier-Fodéré, *Cours de droit diplomatique*, 2nd ed., Paris, 1899, p. 544, note. See the following decisions: Du Penhoat, Apr. 26, 1855, Lebon, 313; Lucas, Feb. 1, 1851, Lebon, 86; Jecker, Nov. 18, 1869, Lebon, 890; Poujode, Sirey, 1906, 3, 158 and particularly Dupuy, Jan. 12, 1877, Lebon, 48. For English law on the general question, see W. W. Lucas, "The legal status of sovereignty" in 24 *Juridical Rev.* (1912), 185-200.

¹ Brémont in article "Actes de gouvernement" in 5 *Rev. de Dr. Pub.* (1896), 57.

² *Frelinghuysen v. Key*, 110 U. S. 63; *U. S. ex rel. Boynton v. Blaine*, 139 U. S. 306. The French law appears to be the same, adopting the theory that the distribution of the fund is a part of the original diplomatic act, an *acte de gouvernement*. See the following cases before the Conseil d'Etat: Courson, Jan. 5, 1847, Lebon, 1; Dubois, Apr. 30, 1867, Lebon, 421. Brémont contests this view (*op. cit.*, 58), holding that by the receipt of the fund, the state has by a kind of novation become the debtor, and should be subjected to suit by individual claimants.

³ *Infra*, § 157. See also the French case of Pontus before the Council of State, May 25, 1832, Lebon, 160.

⁴ *Infra*, § 149. See also *Gray v. U. S.*, 21 Ct. Cl. 340, 392 and *Ship Jane, Adams v. U. S.*, Act of Jan. 20, 1885, 23 Ct. Cl. 226, 253.

§ 149. Circumstances under which Government is Liable.

Wharton in his Digest of International Law makes the following statement:

"Should the Government of the United States, either by its neglect in pressing a claim against a foreign government or by extinguishing it as an equivalent for concessions from such government, impair the claimant's rights, it is bound to duly compensate such claimant."¹

The doctrine that *neglect* in the prosecution of a claim can impose a governmental liability, is not believed to be supported by anything but certain loose *dicta*,² and is opposed by law and practice.³ On the other hand, the principle that the renunciation of private claims as an equivalent for national advantages imposes upon the government an obligation to compensate the individual claimants whose property right has thus been used and bartered away for the public good received unchallengable support in several well-reasoned opinions of the Court of Claims in French Spoliation cases, referred to the court under the Act of January 20, 1885. The relinquishment by the United States to France of the claims of its citizens arising out of unlawful captures by French vessels in exchange for the relinquishment by France of her national claims against the United States arising out of the unfulfilled obligations of the United States under the treaty of 1778 was held to render the United States legally liable to the American claimants whose property rights had thus been surrendered.⁴ The

¹ Wharton, II, § 220, p. 556.

² Cited *supra*, p. 376.

³ *Supra*, p. 376.

⁴ For the history of the French Spoliation Claims, see *Gray v. U. S.*, 21 Ct. Cl. 340 and *Cushing v. U. S.*, 22 Ct. Cl. 1. See also Geo. A. King in 6 A. J. I. L. reprinted as Sen. Doc. 964, 62nd Cong., 3rd sess. (1912); The French spoliation claims with special reference to insurance companies, statements of J. Henry Scattergood, Wash., G. P. O. 1910. Wharton, II, 714-728; Moore's Dig. VI, § 1056. The principal cases in which the origin and nature of the claims were discussed are the *Gray* and *Cushing* cases, *Ship Tom*, 29 Ct. Cl. 68; 39 Ct. Cl. 290; *Adams v. U. S.*, 23 Ct. Cl. 226 (discussing effect of art. IV of the treaty of 1800, and incidentally art. II under which the French Spoliation Claims arose; Judge Davis considered erroneous the rulings of the commission under the treaty of 1831, construing art. IV, Kane's notes, 84); *Field v. U. S.*, 27 Ct. Cl. 224; *Schooner Betsy*, 44 Ct. Cl. 506; *Brigs Fanny and Hope*, 46 Ct. Cl. 214. In the Spanish Treaty Claims Commission (Opin. of Commissioner Chandler), it was held that the release of private claims in the treaty of 1898 involved an assumption of payment by the U. S. Opinions filed Dec. 5, 1903, p. 87.

reasoning of the Court is better than the judicial authority upon which it relies, namely, a *dictum* of the Lord Chancellor in *De Bode v. The Queen* (1851), 3 Clark's House of Lords, 465, although the authority of Vattel was convincingly invoked.¹ Notwithstanding these decisions of the Court of Claims, the Supreme Court has held that the appropriations by Congress for the payment of French Spoliation awards are in the nature of a gratuity, a matter of grace and not of right.²

On several other occasions, *e. g.*, in the treaties of 1819, 1834 and 1898 with Spain and in the treaty of 1831 with France, the United States has released the claims of its citizens in return for a lump sum indemnity which it then undertook to distribute among the claimants. In the treaty of 1819, the cession of Florida was the consideration for the surrender of American claims against Spain, the United States agreeing to indemnify its citizens to the extent of five million dollars. In this connection, the government has committed a great injustice to an American citizen by denying all relief in the Meade claim. Briefly stated, Meade's claim, involving a large sum, was one of those surrendered to Spain as a consideration for the cession of Florida. Between the signing and the ratification of the treaty of 1819, Meade liquidated his claim with Spain and secured by decree an acknowledgment thereof. The domestic commission under the treaty of 1819 regarded the decree as evidence of a liquidated claim acquired subsequent to the signing of the treaty and hence not binding on the United States. Only the unliquidated claim did they consider within their jurisdiction, the only admissible evidence in support being the vouchers then in the possession of Spain, which on request of the government, Spain refused to transmit. The commission's labors came to an end before the vouchers could be obtained, leaving Meade's claim unpaid. After numerous unsuccessful appeals for Congressional relief, the claim was ultimately taken to the Court of Claims, Meade basing his main contention for the liability of the United States upon the ground that the government had been negligent in not diligently prosecuting his claim

¹ *Gray v. U. S.*, 21 Ct. Cl. 340, 391, citing Vattel, Bk. IV, ch. II, § 12 (see also Bk. I, § 244) who regards the state's disposal of the private property of its citizens for the public advantage as the exercise of eminent domain.

² *Blagge v. Balch*, 162 U. S. 439.

and obtaining from Spain, as provided by treaty, the supporting vouchers. The Court of Claims¹ held that the commission had made a mistake in its ruling in the matter of evidence, but, while admitting the inequitable result, dismissed the claim on jurisdictional grounds.² On appeal to the Supreme Court, the dismissal of the claim by the original commissioners was upheld on the ground that their jurisdiction extended only to unliquidated claims.³ Thus, notwithstanding an almost uniform admission that the release of Meade's claim to Spain as part of the consideration for the cession of Florida was a taking of private property for the public use, the United States has shielded itself behind attenuated technicalities in order to escape a just liability.

¹ 2 Ct. Cl. 224.

² Namely, that where a special tribunal had been provided by treaty, no action could be brought in the Court of Claims. One of the three judges dissented.

³ 9 Wall. 691. See account by R. Floyd Clarke in 1 A. J. I. L. (1907), 366, *et seq.*; H. R. 226, 36th Cong., 1st sess.; Wharton, II, § 248, pp. 708-714. A contention in the claim of the Brig *General Armstrong*, based on the neglect of the government in its negotiations concerning the claim, was rejected in various Congressional reports.

CHAPTER IV

DISTRIBUTION OF AWARDS AND INDEMNITIES

§ 150. Two Stages of the Proceedings; the International and the Municipal.

In the procedure for the adjustment of an international claim arising out of injuries sustained by a citizen there are two distinct stages, the international and the municipal. The former constitutes an appeal by nation to nation, and both in the case of international arbitration and purely diplomatic adjustment, consists in the determination of the validity and amount of the claim as between sovereigns. These are matters of international law. When the government assumes the obligation of paying the claims of its citizens upon foreign nations, referring the determination of the merits of the claims to a domestic court or commission, the legal questions involved are likewise decided according to the principles of international law.

The distribution of the award by the claimant state and the determination of questions relating to the private ownership of the award constitute the second stage of the proceedings. These are matters to be decided according to the municipal law of the claimant country, whether the award is made in a lump sum for a group of claims,¹ or in a specific amount for the liquidation of an individual claim. The protocol or treaty creating the international commission or the statute

¹ In such cases, the claimant government usually creates a domestic commission for the determination of individual claims upon the lump sum. See, *e. g.*, Act of July 13, 1832 (4 Stat. L. 574) for commission under treaty with France of July 4, 1831; Act of March 3, 1859 (11 Stat. L. 408), for distribution of Chinese indemnity under treaty of Nov. 8, 1858. Act of June 23, 1874 (18 Stat. L. 245), creating court for distribution of *Alabama* award. See *Comegys v. Vasse*, 1 Pet. 193 and *Sheppard v. Taylor*, 5 Pet. 710, under treaty of 1819 with Spain, and *Frevall v. Bache*, 14 Pet. 95, under treaty of 1831 with France. A number of cases dealing with the ownership of claims as between private parties are listed in the Opinion of J. Reuben Clark, Jr., Solicitor, *In re* Distribution of Alsop award (1912), pp. 28-30.

creating the domestic commission usually provides the extent of the tribunal's jurisdiction.¹

§ 151. Finality of Awards.

The question has occasionally arisen as to whether the award of an international commission is final as between the prosecuting government and the successful claimant in whose behalf the claim was presented. The control of the government over an award in all matters affecting its integrity, is well established. The fact that municipal courts have sustained the right of the government to set aside the award for fraud or other good reason, leaving the claimant without judicial remedy against the act of the government, proves clearly that as between the citizen and his own government the award of an international commission is not final.² Nor, as will be noted presently, has the individual any title, legal or equitable, in an award or diplomatic settlement made in his behalf. On the other hand, as between the two governments, the decision of an arbitral tribunal in the case of a single or a collective award is final as to the validity and amount of the claim, although the two governments may, by agreement, set the award aside without consulting the individual claimant.³ It has even been held that the decisions of domestic commissions created by Congress to distribute a collective award to the entitled claimants, are final and conclusive as to the validity and amount of the claims, but not as to the ownership of the amounts as between conflicting claimants, who are left to resort to the ordinary courts.⁴

¹ Opinion of J. Reuben Clark, Jr., Solicitor, *In re* Distribution of Alsop award, p. 15.

² *U. S. v. La Abra Silver Mining Co.*, 29 Ct. Cl. 432; *Boynton v. Blaine*, 139 U. S. 306; *La Abra Silver Min. Co. v. U. S.*, 175 U. S. 423. See, however, the opinion of Hoar, Atty. Gen., in *Gibbes' case* (13 Op. 19) in which he considered that an award gave the claimant a right which could not be divested by the government by resubmitting the claim to a new commission. This opinion is contrary to the general rule, and is not considered good law.

³ *Frelinghuysen v. Key*, 110 U. S. 63; *La Ninfa*, 75 Fed. 513, Moore's Dig. VII, § 1081. Certain awards of the 1857 U. S.-Colombian commission were set aside and resubmitted to the 1864 commission. The Orinoco Steamship Co. award of Umpire Barge was opened and the case resubmitted to the Hague Court, 1909-1910. *Contra* to the rule of the text, Atty. Gen. Hoar's *dictum* in 13 Op. 19.

⁴ *Comegys v. Vasse*, 1 Pet. 193, 212; *Frevall v. Bache*, 14 Pet. 95; *Phelps v. Mc-*

In the Caldera cases, it was held by the Court of Claims and affirmed by the Supreme Court,¹ that this government having diplomatically asserted a claim against China to be valid, a domestic commission or court authorized to pass upon the claim is constrained to regard it, as between this government and the claimants, as a legitimate international claim. This decision constituted the basis for the contention of several claimants before the Spanish Treaty Claims Commission to the effect that the government, having supported a claim for a certain indemnity against Spain, the Commission was bound to consider the claim as valid and to hold the United States under an obligation to pay the indemnity claimed out of the sum set aside by the treaty for the payment of claims.² This argument appears to have been rejected by the Commission.³

§ 152. Award or Indemnity a National Fund, Free from Individual Lien.

It has already been observed that in the prosecution of an international reclamation the government has complete control of the claim and may settle it in such manner as in its opinion may best subserve the public interests. Not being the representative or agent of the individual injured, it need not necessarily, although it does usually, demand a pecuniary indemnity. To this indemnity, when collected, the individual has no legal right, because international responsibility is a relation between states only. The indirect effect of such responsibility is usually, however, the indemnification of the injured individual, not in virtue of any enforceable right or lien upon the fund, but because, first, the receiving state may be bound by agreement toward

Donald, 99 U. S. 298; *Williams v. Heard*, 140 U. S. 529. See also as to finality of decisions of domestic commissions, *Meade v. U. S.*, 9 Wall. 691; *In re Atocha*, 17 Wall. 439. The Department of State, however, altered many awards of the Board passing on Boxer claims against China, particularly in death claims. The Department probably has the same right to open the awards of the Board passing on the 1911 Revolutionary Claims against China. These boards were appointed or their American members named by the Department and not by Congress.

¹ 15 Ct. Cl. 546; 16 Ct. Cl. 635.

² Argument of John G. Carlisle in the Rosario Sugar Co. case, No. 341.

³ Opinions of the Commissioners filed Dec. 5, 1903, p. 85. See also the dissenting opinion of Davis, J., in *Hubbell v. U. S.*, 15 Ct. Cl. 546, 600.

the state making reparation to devote the sum to the indemnification of its injured citizen,¹ or else, secondly, because the receiving state may carry out its moral obligation to bestow the fund upon the citizen whose injury initiated the international claim. Technically, of course, all claims urged by one state upon another are national. It is obvious, however, that there is a distinction between claims founded upon an injury to the people or the country as a whole and those founded upon injury to particular citizens.² It is this distinction which creates the moral obligation in the second case.

§ 153. Nature of Individual Claimant's Title to Fund.

As a matter of law, the indemnity which passes between governments in liquidation of claims arising out of injuries inflicted upon individuals is a national fund free from any lien or trust in favor of any particular individual.³ The government may, as has been seen, waive the payment of an unconscionable award, withhold an indemnity pending an investigation into the *bona fides* of the claim or claimant, and if convinced of the defective right of either, return to the foreign nation an indemnity already paid.⁴ This control over the fund by the execu-

¹ If bound by a treaty to distribute an award, the government may be considered legally bound, inasmuch as, under our system, a treaty is the law of the land. In this connection, the government's control over the distribution of an award is illustrated by the treaty of Nov. 25, 1899 between Italy and Peru for the settlement of Italian claims arising out of the Civil War of 1894-1895, in which Italy reserves the right (art. 8) of giving preference in the distribution of awards to those of its claimants who are most needy. Descamps and Renault, *Rec. int. des traités du xx siècle*, I, 709.

² See *Gray v. U. S.*, Act of Jan. 20, 1885, 21 Ct. Cl. 340.

³ *Williams v. Heard*, 140 U. S. 529; *U. S. v. Weld*, 127 U. S. 51; *Great Western Ins. Co. v. U. S.*, 19 Ct. Cl. 206, 217; *Rustomjee v. The Queen*, 1 Q. B. D. 489; 2 *ibid.* 69; *Mr. Olney, Sec'y of State, to the Attorney General*, Oct. 2, 1895, Moore's Dig. VI, 1034. But see *dicta* in *Comegys v. Vasse*, 1 Peters, 193 and the Act of Parliament, Aug. 2, 1875 (*In re* distribution of awards of British-American commission of 1871, which provided that the sums be turned over to the High Court of Chancery as trustees for the persons entitled thereto. 66 St. Pap. 240). The Act of Feb. 27, 1896 (29 Stat. L. 32) states, however, that "all moneys received by the Secretary of State from foreign governments and other sources, *in trust for citizens of the United States or others*, shall be deposited and covered into the Treasury." This Act is discussed *infra*, § 155.

⁴ *Supra*, p. 374. The government, on receipt of lump sums in settlement of claims,

tive or by the legislative branch of the government is free from interference by the courts, either by mandamus,¹ upon the petition of interested claimants, or otherwise. Although the individual claimant, therefore,—whether in case of a single claim, or a group of claims for which a lump sum is received—has no strict legal or equitable right to the indemnity, its distribution by the government is not a gift² to the individual claimant, who may be said to have at least “an expectancy of interest in the fund”³ and a moral right to receive the benefits of an indemnity collected in his behalf. He has a right of property in the claim and the corresponding indemnity, notwithstanding the fact that it may be unenforceable in law until the government makes it so.⁴

§ 154. Its Distribution a Matter of Executive or Congressional Discretion, Free from Judicial Control.

The indemnity fund having been received by the government may be apportioned and distributed among the various claimants as the Executive or Congress deems proper. The distribution is usually made by the Secretary of State without any special legislative authority, under the general powers possessed by him through the President may return sums in excess of losses actually sustained, *e. g.*, The Chinese Indemnity of 1858 and 1901 and the Japanese Indemnity of 1864, *supra*, p. 375.

¹ *Frelinghuysen v. Key*, 110 U. S. 63; *Boynton v. Blaine*, 139 U. S. 306, 323; *La Abra Silver Mining Co. v. U. S.*, 175 U. S. 423.

² Several state courts erroneously so held in the case of the distribution of the Alabama award (see the summary of the decisions of these courts in 5 *Harvard Law Rev.*, 1891, 204–205). The Supreme Court in *Williams v. Heard*, 140 U. S. 529, reversed these decisions. See also *Comegys v. Vasse*, 1 Peters, 193 and *Phelps v. McDonald*, 99 U. S. 297. But in *Blagge v. Balch*, 162 U. S. 439, the Supreme Court distinguished *Williams v. Heard* and *Comegys v. Vasse* and held that the Act of Congress making appropriations for the payment of French Spoliation Claims (released to France for a consideration, compensation therefor being granted by Congress) was to be regarded as a gratuity to claimants, and not a matter of right. See also *Emerson v. Hall*, 13 Pet. 409. Probably the clearest statement of the claimant's relationship to the international award and to the fund received in payment thereof is set forth in *Williams v. Heard*, 140 U. S. 529.

³ *Williams v. Heard*, 140 U. S. 529.

⁴ *Comegys v. Vasse*, 1 Pet. 193. To effect that claimant's interest may be bought and sold, assigned, devised and pass to legal representatives, see also *Williams v. Heard*, 140 U. S. 529 and *Porter v. White*, 127 U. S. 235; to effect that it constitutes a chose in action, *Judson v. Corcoran*, 17 How. 612.

to conduct the foreign relations of the government.¹ This is usually the practice when a single claim is paid, and in principle is not altered by the fact that a group of claims is paid in a lump sum. In the latter case, it is usually deemed more convenient to create some kind of judicial commission to apportion the fund received.

Both the Executive and Congress have certain plenary powers over the fund received and an absolute discretion in its distribution. For example, as already observed, the Executive may either decline to enforce payment of an award considered erroneous, as was done by Secretary Bayard in the cases of Pelletier and Lazare against Haiti, or he may withhold payment to claimants, uncontrolled by the courts, pending diplomatic negotiations for the opening of an award. In the conclusion of new treaties for the resubmission of claims to arbitration the power of the Senate may also be involved. In the refunding of an award obtained by fraud or imposition, and the investigation of the matter of fraud, Congressional legislation has usually been invoked, principally because the Executive or political branch of the government has no machinery for the examination of essentially judicial questions, the method for their examination being left to the direction of Congress. Congress has on several occasions delegated this judicial function to the Court of Claims, and the constitutionality of its action has been upheld by the courts.² As a matter of fact, after the international questions have been settled, Congress has plenary jurisdiction over the distribution of the national fund, provided it chooses to act.³

In the exercise of its full control over the matter of distribution, Congress has directed payment to certain claimants and excluded others; *e. g.*, in the payment of French Spoliation claims, Congress

¹ The decisions of the French Council of State exclude judicial review of the executive act of distributing awards, on the ground that it is a diplomatic act, or "*acte de gouvernement*" (Courson, Jan. 5, 1847, Lebon, 1; Dubois, Apr. 30, 1867, Lebon, 421) although adverse claimants may sue the beneficiaries of the distribution in the courts (Pontus, May 25, 1832, Lebon, 160). This closely resembles the American practice.

² *E. g.*, *U. S. v. La Abra Silver Min. Co.*, 175 U. S. 423 (29 Ct. Cl. 432); *U. S. v. Weil*, 35 Ct. Cl. 42; *U. S. v. Diekelman*, 92 U. S. 520 (8 Ct. Cl. 371).

³ Opinion of Solicitor, Distribution of Alsop award, pp. 17-27. In most cases, the distribution is left to the Department of State exclusively.

provided that only the next of kin of the "original sufferer" should benefit, to the exclusion of assignees in bankruptcy and insurance companies,¹ and in the distribution of the Alabama award under the Act of June 23, 1874, after providing that the Commission might award attorney's fees to those appearing for claimants, declared null and void all other liens or assignments and transfers for services rendered made before the judgment of the commissioners was handed down.² Congress may designate any court to hear claims against awards received from foreign powers, and for this purpose has often designated the Court of Claims or special tribunals, whose decisions, unless reopened by Congress and appeal allowed,³ are final on the question of validity and amount of the claim.

Unless specially designated by Congress for the purpose, the Court of Claims has denied its jurisdiction over claims against the United States arising out of an award paid to the United States under treaty or agreement with a foreign power, either because it was considered a claim growing out of a treaty under § 1066 of the Revised Statutes or because the obligation of the government to pay a claimant cannot be deemed a contract, express or implied.⁴

In most cases, particularly where single claims are collected, Congress has not interfered with the free exercise of the Executive's discretion in the distribution of awards.⁵

Prior to the Act of February 27, 1896, which will be considered presently, it was the practice of the Executive, through the Secretary of State, to pay over to the injured party or parties the indemnity collected, without any act of Congress. Only in exceptional cases,

¹ 26 Stat. L. 897, 908. As to the plenary power of Congress over awards see *Blagge v. Balch*, 162 U. S. 439.

² See full text of § 18 of Act of June 23, 1874, 18 Stat. L. 249. *Bachman v. Lawson*, 109 U. S. 659.

³ S. J. Res., May 25, 1908, allowing appeal to Court of Claims from decisions of U. S. commissioners in the Boxer Indemnity claims. 35 Stat. L. 577, For. Rel., 1908, 65.

⁴ *Great Western Ins. Co. v. U. S.*, 19 Ct. Cl. 206 (112 U. S. 193); *Alling v. U. S.*, 114 U. S. 562 (17 Ct. Cl. 311).

⁵ Committees of Congress have expressly conceded that the Department of State had full power and authority in the distribution of awards. Sen. Rep. 311, 47th Cong., 1st sess., March 23, 1882; H. Rep. 700, 45th Cong., 2nd sess., April 24, 1878, p. 2.

did Congress interfere with the Secretary's discretion in the disposition of funds received.¹ When there was a single claimant, or where a domestic commission had apportioned the individual claims against a lump sum indemnity, the Secretary of State paid the person who appeared to be *prima facie* entitled, namely, either the claimant or his assignee of record. Should the fund have been paid to one not equitably entitled, no liability was incurred by the Secretary, but the courts, in actions for money had and received or by way of injunction, granted appropriate relief to the persons rightfully entitled, either by allowing recovery of moneys paid to claimants not entitled, or by perpetually enjoining the receipt of the moneys by one who may be *prima facie* but not equitably entitled.²

It has already been observed that the courts have no jurisdiction over the Secretary of State either to compel or enjoin the distribution of funds. It is established law that the government cannot be sued in the ordinary courts without its consent, nor is the Secretary of State subject to any judicial decree tying up the fund or directing his action in the discharge of such an important executive function as the distribution of awards, over which, by its nature, the Executive—subject to direction by Congress, if Congress desires to act in the matter—has unquestionable control.³ The Secretary's control over the funds cannot be intrenched upon, directly or indirectly, by way of mandamus, injunction or suit, to recover the funds or to fetter his discretion by the declaration of a lien or trust.⁴

§ 155. Practice of Department of State under Act of February 27, 1896.

Prior to the statute of 1896 there was no customary place for the

¹ Act of June 18, 1878, 20 Stat. L. 144, conferring on Secretary exclusive jurisdiction over the distribution of the awards of the U. S.-Mexican commission of 1868. *Virginus* indemnity, Joint Res. of Dec. 16, 1882, directing Secretary to pay a portion of the fund received from Spain to a person not included in the original plan of distribution. See H. Ex. Doc. 15, 45th Cong., 1st sess., H. Ex. Doc. 72, 45th Cong., 2nd sess.

² Brief of Solicitor Penfield in *Pell v. Hay*, Supreme Court of the District of Columbia, 1902.

³ *Stubbs' case*, 10 Op. Atty. Gen. 31, 32.

⁴ Brief of Solicitor Penfield in *Pell v. Hay*, citing 10 Op. Atty. Gen. 31, *Frelinghuysen v. Key*, 110 U. S. 63, *Boynton v. Blaine*, 139 U. S. 306, and *Rustomjee v. The Queen*, 2 Q. B. D. 69.

deposit of funds received from foreign governments in payment of claims. These moneys, which for various reasons were withheld from immediate distribution, were occasionally deposited by the Secretary of State in private banks, where the money earned interest. Disputes sometimes arose as to the ownership of the increment, it being finally settled that as between the government and the claimant, the government and not the claimant had title to and the benefit of any accretions to the fund.¹ In the case of the indemnity received from Venezuela under the subsequently reopened awards of the 1866 commission, Congress provided that the increment or accretions of the funds invested in banks should be credited to Venezuela and applied to the payment of the awards of the 1885 commission.²

The diversity and uncertainty in practice and the absence of Congressional authority for the deposit of funds received by the Secretary of State in payment of claims constituted the reason for the enactment by Congress, upon request of Secretary Olney, of the Act of February 27, 1896,³ providing for the deposit of funds in the Treasury, and for the procedure for their disbursement.⁴ In other respects, the Executive prerogative in the disposition of indemnities has not been affected. By the Act, Congress has exercised its jurisdiction, under municipal law, to provide for the disbursement of national funds. The Act reads as follows:

“Hereafter all moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others, shall be deposited and covered into the Treasury.

“The Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due.

¹ *Angarica v. Bayard*, 127 U. S. 251.

² Act of Jan. 21, 1895, 28 Stat. L. 635. In the Senate Report on this bill, it is declared that the investment of indemnities is unauthorized by law. Sen. Rep. 691, 52nd Cong., 1st sess., reprinted in Sen. Doc. 231, pt. 3, 56th Cong., 2nd sess., compilation of reports of Committees on For. Rel.

³ 29 Stat. L. 32. See explanatory statement of Representative Hitt in the Congressional Record, 54th Cong., 1st sess., v. 28, pt. 2, p. 1058, reprinted in Sol. Op. *In re* Distribution of Alsop award, p. 45.

⁴ Some account of the earlier practice in the disbursement of funds received in payment of international claims is found in Moore's Dig. VI, 1030-1031.

"Each of the trust funds covered into the Treasury as aforesaid is hereby appropriated for the payment to the ascertained beneficiaries thereof of the certificates herein provided for."

There are no reported cases under this statute, although suits have been brought under it involving the right of individuals to compel the action of the Secretary of State or the Secretary of the Treasury by mandamus or injunction; but in line with previous decisions of the Supreme Court, the Secretary of State's discretion had been held to be uncontrollable by either of these writs. Indeed, the only essential innovation inaugurated by the statute is to make a permanent appropriation of such funds deposited in the Treasury, as are ordered paid by the certificates of the Secretary of State. Moreover, the statute is merely declaratory in leaving the absolute and exclusive determination of the disposition of the funds to the discretion of the Secretary of State. Had the courts the power to restrain the Secretary of State, or the Secretary of the Treasury in the disbursement of moneys on the certificate of the Secretary of State, it would very substantially impair the Secretary of State's jurisdiction, having the effect of making the Secretary's determination merely a preliminary formality and placing the real power to determine the beneficiaries in the courts.

The statute of 1896 contemplates four operations by the Secretary of State in his control of indemnities: (1) the receipt of the money from the foreign government; (2) covering the money into the Treasury; (3) the determination of the amounts due claimants respectively from such funds; and (4) the certification of the same to the Secretary of the Treasury by the issuance of certificates.¹

The first and second steps require no explanation, so that attention may at once be given to the third and fourth. The third operation imposes upon the Secretary of State² primarily and essentially a judicial function in the exercise of the municipal jurisdiction which attaches to the fund when received, rather than an executive function in the conduct of foreign relations. These judicial duties involve two processes: (a) the determination of who the claimants are, *i. e.*,

¹ An excellent analysis of the Act of 1896 and the powers of the Secretary thereunder is to be found in the opinion of J. Reuben Clark, Solicitor, *In re Distribution of Alsop award* (1912), pp. 36-45.

² The Secretary usually delegates these duties to the office of the Solicitor.

the beneficiaries entitled to indemnities, and (b) the determination of the amounts due them.

§ 156. Who are "Claimants" Entitled to Distribution of Funds.

Prior to 1896, it was the practice of the Secretary of State in distributing awards to pay the funds received by way of indemnity to those who had sustained the injury at the hands of the foreign government, or to those who held uncontested assignments or orders to pay, of record in the Department. Payment to assignees and vendees was made as a matter of convenience and favor to the parties. Contesting parties to a fund were referred to the courts, the Secretary's discretion enabling him in the meantime to pay those whom he regarded as primarily the claimants, or to withhold the money pending adjudication by the courts, the decisions of which he always respected.¹

The statute of 1896 has not altered the Secretary's power or enlarged his jurisdiction. In the authority conferred upon him to "determine the amounts due claimants," the term "claimants" is construed, in accordance with the practice of the Department and of the courts,² to embrace those who sustained the injury and in whose behalf the claim is prosecuted, *i. e.*, those having the initial or primary rights, and not to extend to those who have secondary or derivative rights, arising by inheritance, assignment, or purchase from original claimants. The Secretary, therefore, being constituted a special tribunal for the determination of the persons who are claimants, need not concern himself, unless specially directed by Congress, with the adjudication of those manifold derivative or subsidiary rights arising out of the relation of creditor, stockholder, lienholder, attorney, agent, assignee in bankruptcy, receiver, and similar relationships. These secondary

¹ The Secretary's power and right to withhold payment pending the result of litigation between conflicting claimants was sustained in *Bayard v. White*, 127 U. S. 246. The Executive's inability properly to adjudicate a conflicting claim, and his power to conserve the rights of all parties pending a settlement of their differences is recognized in *Redfield v. Windom*, 137 U. S. 637. See also *In re Idler* certificates, Opin. of Solicitor Partridge, 21 Sol. Op. 404, cited by Solicitor Clark.

² *Frelinghuysen v. Key*, 110 U. S. 63; *Alling v. U. S.*, 114 U. S. 563; *La Abra Silver Min. Co. v. U. S.*, 175 U. S. 423. By international commissions the term has been sometimes loosely used to cover the assignee, representative, agent or attorney actually prosecuting the claim.

claimants, who allege legal or equitable ownership in the fund, are properly referred to the courts, partly because the Secretary's jurisdiction is special and should be strictly construed, and partly because the Department of State lacks the legal machinery properly to conduct a judicial inquiry.¹

§ 157. Conflicting Claims of Secondary Beneficiaries Usually Referred to Courts.

It is the established usage of the Department, therefore, to pay awards to the original claimant, as the entitled beneficiary of an indemnity, or, as a matter of convenience to the parties, to the uncontested assignee of record or proved heir or legatee. When, however, the Department has been notified of conflicting claims against the fund in its hands, even if not represented by assignments of record, the Department may and does frequently withhold payment for a reasonable time in order to allow the parties to settle their differences, amicably or in the courts.²

The Department primarily recognizes only original beneficiaries of an indemnity and those who hold uncontested assignments or orders to pay. Creditors of the beneficiaries, by judgment or otherwise,—unless assignees of record—are remitted to their legal or equitable remedies in the courts, the Department respecting any final judgments they may obtain.³ In cases where corporations are beneficiaries, both

¹ Solicitor's opinion *In re* distribution of Alsop award, p. 40, citing Mr. Evarts, Sec'y of State, to the President, Aug. 13, 1879, Ex. Doc. 103, 48th Cong., 1st sess., 582, and *La Abra Silver Min. Co. v. U. S.*, 175 U. S. 423. For a summary of cases involving litigations between persons holding derivative interests in a fund, see Solicitor's Opin. *In re* Alsop award, 28-30.

² See *Bayard v. White*, 127 U. S. 246.

³ The Department does not recognize creditors' attachments upon awards, issued out of foreign courts, as liens, but leaves creditors to their ordinary recourse against their debtors in the courts. A foreign judgment transformed by suit into a domestic judgment would be recognized. An attachment cannot issue in courts of the U. S. against funds in the hands of the Secretary of State. In Italy, creditors' attachments against funds collected by the Minister of Foreign Affairs on behalf of private claimants seem to be issued by the courts. See *Cerruti (Italy) v. Colombia*, award of July 6, 1911, 6 A. J. I. L. (1912), 1023, 1027. Anzilotti states that a creditor can bring no judicial action against an undistributed award in the hands of the government, 13 R. G. D. I. P. (1906), 309.

stockholders and creditors are so remitted, the Department dealing only with the duly qualified representative of the corporation.

The Department has often had occasion to pass upon the validity of agreements between claimant and counsel with a view to establishing a lien upon the fund received in payment of a claim. Valid contracts for attorney's services in the prosecution of a claim having been construed by the courts as creating a lien upon the fund recovered,¹ the Department has considered such contracts in the character of assignments of interest, and even when without agreement valuable services in the collection of claims were rendered by attorneys, the Department has protected the equitable interests of such counsel by the allowance of a reasonable fee.² In the act creating the Court of Commissioners of Alabama Claims, Congress provided for reasonable compensation to attorneys or counsel, to be allowed as part of the judgment.³

The government usually considers as a lien upon awards, the expenses it may have incurred in the prosecution of a claim.⁴ These expenses are deducted before distribution of the award to claimants. Debts due to the United States by the claimant are always first liens, and may be deducted immediately.⁵

§ 158. Method of Proving Title as Claimant or Beneficiary.

No formal procedure is required for establishing before the Department a person's right as a beneficiary of a fund. Such person is simply required to furnish the Department with a statement adequately setting forth his interest, accompanied by such documentary or other proof as may be necessary, *e. g.*, proof of identity, a duly executed assignment, an exemplified copy of a will and record of probate proceedings, or letters of administration. Before making payments to

¹ *Wylie v. Coxe*, 15 How. 415; *Bachman v. Lawson*, 109 U. S. 659.

² Twenty per cent of the award was considered as a reasonable fee in the case of the ten seamen of the schooner *C. H. White*, in whose behalf an award of \$3,000 was received from Russia.

³ Act of June 23, 1874, § 18, 18 Stat. L. 249; *Bachman v. Lawson*, 109 U. S. 659.

⁴ *Infra*, § 161.

⁵ See *Alling v. U. S.*, 17 Ct. Cl. 311, reversed in 114 U. S. 562 on jurisdictional grounds.

an administrator, the Department requires evidence that he has filed adequate bonds as administrator with the appropriate court, and in addition a bond covering the amount of the payment to be made by the Department, the bond sometimes having to be approved under the seal of the court. This additional bond must also be filed by the assignee of an administrator. It appears that in a few cases a bond in double the amount of the payment to be made, running to the Department or to the Government, has been required as a condition of payment, the purpose of the bonds being, naturally, to insure the ultimate receipt of the money by those entitled thereto, and thus to relieve the Department of all responsibility in the matter, moral as well as legal. Attorneys or representatives of entitled beneficiaries must file powers of attorney as a condition of payment.

Occasionally, before making a payment, the Department gives notice of a proposed payment to persons claiming an interest in the fund, when such notice had been requested. This is not, however, the usual practice, and it has been done in exceptional cases only.

The Secretary of State being properly regarded as having jurisdiction to pass only upon the rights of those who are initial or primary beneficiaries, and recognizing only these primary claimants and those holding uncontested instruments of transfer of interest or assignment from them, the Secretary has on numerous occasions declined to admit any assertion of a lien upon the funds in his hands by those holding secondary or derivative interests by virtue of certain legal relationships with the original claimant. If the primary beneficiaries have no such lien or legal right,¹ *a fortiori* those holding derivative interests are without such rights so long as the funds are in the hands of the government. The complicated questions of law and fact which are incidental to the determination of the various kinds of derivative rights are best left to the jurisdiction of the ordinary courts of justice, where the proper machinery for their adjudication is provided.²

¹ Notwithstanding the fact that the statute denominates the moneys received from foreign governments as "trust funds," no court has yet granted the claimant the equitable rights of a *cestui que trust*, nor held the government liable as a trustee. The statute is believed merely to express the moral obligation inherent in the receipt of the funds.

² A summary of cases in which suits have been brought against beneficiaries of

While the Secretary of State has, as a matter of convenience, usually undertaken to pass upon claims against awards when the case seems clear, he has, in more complicated cases, taken the position that he could refer the claimants to the Court of Claims for the establishment of their various interests.¹ In many cases, such claimants have been referred to the ordinary courts.² Prior to the Act of 1896, the Secretary either deposited the money in a bank, by agreement with the parties, or withheld payment, to await the decision of the court. Under the Act of 1896, upon such a reference to the courts, the Secretary may suspend the issuance of his certificate upon the Secretary of the Treasury.

§ 159. Method of Making Payment.

Having himself determined or become satisfied by the decision of a court, who the entitled claimants are, and the amounts due them respectively, the Secretary of State then issues his certificate to the Secretary of the Treasury, who, according to the statute, must pay the amounts mentioned in the certificates to the ascertained beneficiaries thereof, the statute itself making the necessary appropriation for this purpose. These certificates are issued to the original claimants, or, as a matter of grace and accommodation to the parties in interest, to persons holding uncontested assignments, orders for payment, powers of attorney, or other instruments evidencing a direction and willingness on the part of the original beneficiary to have the sum so paid.³ When the assignment or order is contested by the person granting it or his successor, and the parties cannot agree or decline to sub-

awards or their successors by those holding derivative rights to a fund is presented in Solicitor's Opin. *In re* Alsop award, 28-30.

¹ Although no case has been found where the Secretary has actually submitted a case of this kind to the Court of Claims, he has made the suggestion to claimants on several occasions, and it would seem clear that he has the right so to refer contesting claimants, without their consent, under § 2 of the Bowman Act, Mar. 3, 1883, 22 Stat. L. 485 and § 12 of the Tucker Act, Mar. 3, 1887, 24 Stat. L. 505. See *Billings v. U. S.*, 23 Ct. Cl. 166, 173.

² *Bayard v. White*, 127 U. S. 246; *Porter v. White*, 128 U. S. 235; 21 MS. Sol. Op. Dept. of State, 404, cited by Solicitor Clark; Solicitor's Opinion *In re* Distribution of Alsop award, pp. 28-30.

³ Solicitor's Opinion *In re* Distribution of Alsop award, p. 43.

mit their differences to a designated tribunal for adjudication, the Secretary may and sometimes does issue the certificate to the original claimant, leaving the contesting parties to assert their legal or equitable interests in any portion of the fund in a suit in the ordinary courts against the payee in order to determine the ultimate ownership of the fund or any particular portion of it.¹

§ 160. Remedies of Rival Claimants or Beneficiaries. Secretary's Determination not Final.

Persons who contest a distribution made by the Secretary, or rival claimants, have two remedies open to them: (1) They may sue the person to whom the money has been paid in an action for money had and received, and thus recover from such person such money as may equitably belong to the plaintiff; or (2) the complaining party might, before payment of the money, enjoin the other from receiving any of such fund from the Secretary of the Treasury (formerly the Secretary of State).

While there is no provision in the statute of 1896 for an appeal from the Secretary's decision or for a review of his findings as to the persons entitled to share in the award, the money being in fact appropriated to pay "to the ascertained beneficiaries thereof of the certificates" issued by the Secretary of State, it seems clear, notwithstanding the absence of any adjudication by the courts upon the question of the finality of the Secretary's determination, that it is final only in the sense that it cannot be set aside by any court and that no action against the government or any official thereof can be brought by dissatisfied payees or others. In the matter of the ultimate ownership of the fund, however, and the conflicting claims of persons holding derivative rights—questions, indeed, which the Secretary is not presumed to have determined—his decisions and findings are not conclusive, any more than are the awards of claims commissions regarding the ownership of the funds with the distribution of which they are charged by treaty or statute. To regard the Secretary's determination as conclusive upon these secondary claimants, would make it a judgment *in rem*, a mani-

¹ Municipal courts pass only upon the disposition of the fund, not the merits of the original claim (*Comegys v. Vasse*, 1 Pet. 193), unless Congress specifically refers the whole claim to the Court of Claims or a domestic tribunal.

fest impossibility. Moreover, the absence of all machinery in the Department for conducting judicial inquiries and the fact that the Secretary is not always a trained lawyer and other practical considerations of a political nature,¹ all point to the certainty that the Secretary's determination is not final upon the question of ownership of the fund, nor conclusive upon derivative claimants. The courts, therefore, in the manner already indicated, are always open to such claimants against the individuals to whom awards may have been distributed.

§ 161. Expenses of Arbitration Usually Charged to Claimants.

It may be added that the government frequently provides for the payment by the claimants of the expenses of an arbitration, deducting the government's share from the awards distributed to claimants. The deduction of these expenses from awards is occasionally provided for in the treaty establishing the arbitral commission.² In the case of the Alabama awards under the Act of 1874, the expenses of the arbitration were not deducted from the awards.³ In the submission of single claims to arbitration, various terms may be made, *e. g.*, the claimant and the defendant government may bear the expenses in

¹ Solicitor's Opinion *In re* Distribution of Alsop award, p. 41.

² Sometimes only the expenses of the Commission are so provided for, each government paying its own arbitrator, secretary and agent or counsel. See, as examples of clauses providing for deduction of expenses from awards, the treaty between U. S. and Chile of Aug. 7, 1892, art. 10, Malloy, I, 188; between U. S. and France, Jan. 15, 1880, art. 10, Malloy, I, 538; between U. S. and Great Britain, Feb. 8, 1853, art. 6, Malloy, I, 667; between U. S. and Great Britain, May 8, 1871, art. 16, Malloy, I, 707; between U. S. and Mexico, July 4, 1868, art. 6, Malloy, I, 1131; between U. S. and Peru, Dec. 4, 1868, art. 6, Malloy, II, 1413. In all these cases the deduction was not to exceed 5 per cent of the awards. In the conventions between Great Britain and Chile, Sept. 26, 1893 (85 St. Pap. 24) and Sept. 29, 1887 (78 St. Pap. 774), between Great Britain and Nicaragua, Nov. 1, 1895 (87 St. Pap. 55), and between Italy and Chile, 1888 (For. Rel., 1888, I, 187), the amount to be deducted was not to exceed 6 per cent. In the recent compromise of Dec. 18, 1913 between France and Turkey (41 Clunet, 1914, 1444), France undertook to retain 10 per cent. of awards for expenses. Article 7 of the protocol of Nov. 25, 1899 between Italy and Peru, left the percentage to be deducted for expenses to the determination of the Arbitrator. Descamps and Renault, *Rec. int. des traités du xx^e siècle*, 1901, p. 701.

³ *U. S. v. Weld*, 127 U. S. 51 (23 Ct. Cl. 126). In the agreement of Feb. 12, 1871 with Spain, it was provided that the expenses of the arbitration were to be defrayed by a percentage to be added to the amount awarded (Malloy, II, 1663). This relieved claimants of the obligation to bear the expenses of arbitration.

equal proportions.¹ When the protocol of submission contains no stipulation as to deductions from awards to cover expenses, the prosecuting government may charge its entire expenses upon the claimants.² The reimbursement of the government's expenses requires no special agreement or understanding with the claimants. The government's complete control over the indemnity received enables it to deduct from any amount to be distributed such expenses as it may deem properly chargeable to the award. A government may even require claimants to deposit in advance a percentage of the sum claimed, to cover expenses and as an earnest of good faith. A demand by Germany for a deposit of 2 per cent of the sums claimed by its subjects from Haiti in the German-Haitian arbitration of 1913 is reported as having resulted in the withdrawal of a considerable number of claims.³

¹ Ozama Bridge claim (U. S.) *v.* Dominican Rep., Mr. Powell to Gen. Heureaux, Mar. 5, 1898, For. Rel., 1898, 276. Such division may be conditioned upon success of claimant in the arbitration. Freraut (France) *v.* Chile, July 3, 1897, art. 5, For. Rel., 1897, p. 53.

² This was done in the case of the Pious Fund claim against Mexico submitted to the Hague tribunal, and in the Alsop claim against Chile, submitted to His Britannic Majesty. In the Alsop case, there was an agreement between the parties stipulating for such deduction. Solicitor's Opinion, *op. cit.*, 79.

³ Such a deposit of "security for costs" is most unusual. It may serve to eliminate claimants in bad faith, but may also disable and work an unnecessary hardship upon needy claimants.

CHAPTER V

EXTENT OF PROTECTION

§ 162. Factors Determining Measure of Protection.

The discretion possessed by the government in the grant of diplomatic protection and in the prosecution of claims is well illustrated by the different degrees of protection which it exercises on various occasions. These variations in the extent of protection depend primarily upon the nature of the offense or injury to be redressed. Other factors which enter into consideration in determining the extent of protection are the character and reputation of the local government for the proper administration of justice, the political expediency of instituting harsh or mild measures, the conduct and character of the claimant with respect to his title to diplomatic protection, the nature of the claim, tortious or contractual, and the need of the claimant. For these reasons, it is impossible to state with any degree of precision the measure of protection which in a given case will be accorded to American interests abroad, for the action of the government necessarily depends upon all the facts and circumstances of the case, and the principles of international law applicable thereto. Nevertheless, notwithstanding the absence of any definite controlling principle, it may not be without interest to examine certain classes of cases in which an attempt has been made to follow a consistent practice.

It frequently happens that an American citizen contemplating investment in a foreign enterprise or departure from the United States for the purpose of engaging in business abroad inquires of the Department of State what governmental protection or assistance he may expect or rely upon. Such an inquirer is usually informed that the Department cannot undertake to answer hypothetical questions, or anticipate its action or forecast the effectiveness of its assistance in a given case, since the questions of international law usually involved in such cases, depending as they do upon individual facts and circum-

stances, do not readily admit of decision in advance of an actual case. The Department usually adds, however, that it is always solicitous that rights of American citizens abroad should receive from foreign governments the respect due to them under existing treaties and international law, and that the Department is always ready to take up with a foreign government the question of adjusting any wrongs which American citizens may have sustained in their persons or in their just, fair and equitable property rights which have been acquired by proper and legal methods. The inquirer is further advised that the government is represented abroad by consular and diplomatic officers, to whom American citizens may appeal when they deem their rights violated or in imminent danger of violation. In an instruction to consular officers, dated August 25, 1898, consuls were urged to be vigilant in the protection of American citizens in their consular districts. The instructions concluded with the following paragraph:

"You are directed to be prompt and active in reporting to the Department all cases of arrest of American citizens or of outrages upon their rights. You will also be ready at all times to do your utmost in behalf of our citizens and for the protection and extension of their interests." ¹

§ 163. Fostering American Interests Abroad.

In the encouragement of American enterprises abroad, the government lends its support to such as are legitimate and nationally beneficial, the degree of support being measured by the national advantages to be expected. In his Annual Message of 1909, President Taft declared that in considering whether American enterprise should be encouraged in a particular country, "the government should give full weight . . . to the fact whether or not the government of the country in question is in its administration and in its diplomacy faithful to the principles of moderation, equity and justice upon which alone depend international credit, in diplomacy as well as in finance." ² Such encouragement is most frequently sought in the exploited countries of Latin-

¹ Thos. W. Cridler, Third Asst. Sec'y to the consular officers in Mexico, Central America and South America, August 25, 1898.

² For. Rel., 1909, xv. As to cable concessions in South America, considered a national advantage, see Sec'y Bayard quoted in Moore's Dig. VI, 326.

America and in the Near and Far East. In such cases, the Department usually, upon request, instructs its diplomatic representative accredited to the country in question to use such influence as he legitimately may to secure consideration for the American interests requesting support—without discriminating, however, against other American interests. The Department of State does not attempt to endorse individuals as to their responsibility nor to express any judgment as to business enterprises, beyond bringing them to the attention of the authorities abroad through American diplomatic representatives.¹ Applicants for concessions in Cuba and the Dominican Republic, and in other Latin-American Republics to which the Platt Amendment might be extended, must necessarily secure the Department's approval of the concession before it may be granted, and it is becoming a practice for American concessionaires in other Latin-American countries to submit the terms of a proposed concession-contract to the Department for approval. By so doing, the legitimacy of the concession may be examined, and eventual protection facilitated.

§ 164. Preventive Measures.

Although it is unusual to extend protection in advance of an actual occurrence rendering interposition proper, the government has not infrequently filed a diplomatic protest against proposed municipal legislation of foreign countries which, if enacted, would impair the rights or interests of American citizens. Sometimes the diplomatic representative is instructed to use his good offices to bring to the attention of the government to which he is accredited the injurious effect upon American trade and commerce of proposed municipal legislation. Thus, objections of this government against a proposed increase of a foreign tariff rate which seemed prohibitive to American commercial interests have been diplomatically presented. In like manner, protests have been filed against proposed monopolies which appeared violative of treaty rights or inimical to American trade.² Good offices have been employed³ and protests filed against the application to American

¹ See as to applications for financial concessions in Turkey, For. Rel., 1909, 59.

² Protest to Haiti against grant of a soap monopoly to certain French concerns, 1907-1908. See also *supra*, p. 182.

³ Good offices were used to secure modification of order prohibiting American life

citizens of enacted legislation abroad which, if enforced, would be deemed to violate the rights of an American citizen, whether under municipal law, treaty, or international law.¹

What might be called preventive measures of protection are occasionally employed in that subjects going abroad are warned to provide themselves with certain documents calculated to relieve them of the embarrassment of detention, examination or other burdens.²

The most usual method of safeguarding and fostering the rights and interests of citizens is by means of international treaties and conventions. With the growth of international intercourse these treaties have covered a wider and wider range of subjects, until at the present time the measure of the alien's civil and commercial rights is largely to be found in treaties. To some extent, the principal rights of aliens—or citizens abroad—have been considered in the chapter on aliens.³ At this point, it is merely necessary to note that the measure of the rights of citizens abroad and therefore the measure of the extent of protection for infringement thereof is to be found largely in treaties.

§ 165. Request for Local Protection in Foreign Country.

Under ordinary circumstances, the first step in the exercise of the protective function is to demand of the local government the full measure of local protection which its laws afford.⁴ Assuming that

insurance companies from doing business in Prussia. H. Doc. 247, 54th Cong., 1st sess.; For. Rel., 1895, I, 428-453. As to Argentine, see Moore's Dig. VI, 326, and as to Chile, For. Rel., 1896, 43.

¹ Objection noted to Guatemalan decree providing for imprisonment, in case of fire, of beneficiary of insurance policy. Mr. Adee, Acting Sec'y of State, to Minister Sands, For. Rel., 1909, 344. Protest against certain interpretation of Honduran law relating to national vessels. Mr. Adee to Minister Brown, Sept. 7, 1909, For. Rel., 1909, 368. As to protests against prohibitions or restrictions by foreign countries on the importation of cattle, hogs and beef, see For. Rel., 1891, under various countries.

² *E. g.*, British subjects going to Argentine were instructed to provide themselves with birth certificates and protection papers to escape military service. Notification of August 22, 1898; 90 St. Pap. 1176. Unusual precautions in the matter of passports, such as attaching an unmounted photograph to the passport, have been adopted by the Dept. of State in the case of American citizens going to Europe during the present European war.

³ *Supra*, § 34 *et seq.*

⁴ See the discussion of the rights of aliens, *supra*, § 17 *et seq.*

the government is properly organized, such a suggestion will often suffice to prevent a flagrant violation of the rights of aliens. The United States, for example, has on many occasions called on Turkey and China to afford protection to American citizens and prevent attacks by brigands and others.¹ Again, when an American citizen is arrested abroad charged with a penal offense, the diplomatic officer's first duty is to see that he receives the benefit of the safeguards against oppressive treatment provided by the local law and that his trial is conducted fairly. While in first instance the protection of aliens is a matter incumbent upon the local government, and foreign governments, in the absence of a flagrant case, usually advise their subjects to resort to the local courts for the redress of their grievances,² it is nevertheless beyond dispute that the local government cannot be the final judge of its own conduct. Indeed, foreign governments are conceived to have the right and duty to determine whether their subjects have been accorded the protection due them under public law and the applicable treaties. Diplomatic interposition then, if deemed proper, is the substitution by the protecting state of its own action for that of the local state based upon default in a function originally incumbent upon the latter.

In this connection, it is interesting to note that when the attention of the United States is called to the delinquency of local authorities in complying with a treaty or municipal law, to the detriment of a foreigner, the Department of State must address the Governor of the state calling his attention to the complaint and requesting a removal of the cause or appropriate measures of satisfaction. If the Governor, however, does not secure the enforcement of the treaty or municipal law by the local authorities, the federal government has no machinery to compel his action, and in mob violence cases, as has been observed, has often had to pay heavy indemnities for the failure of the states properly to enforce or vindicate the treaty rights of foreigners. When

¹ For. Rel., 1895, II, 1237 *et seq.*; 1318 *et seq.*; For. Rel., 1907, II, 1071. For a case in Haiti, where local protection was first demanded, see For. Rel., 1904, 397. See also Marquis Salisbury to Mr. Ashburnham, Feb. 16, 1880, 75 St. Pap. 1059 (case in Bulgaria); Lord Granville to Sir C. Wyke, Dec. 24, 1883, 75 St. Pap. 456; Field, Adm., *v.* U. S., Act of Jan. 20, 1885, 27 Ct. Cl. 224.

² *Infra*, § 381 *et seq.*

new treaties are concluded or a particular provision of a treaty has not been enforced by the states, the Department sometimes informs the governors of the various states of the terms of the treaty provision in question, and requests its enforcement.¹

The Instructions to Diplomatic Officers provide that diplomatic representatives of the United States should "protect [American citizens] before the authorities of the country in all cases in which they may be injured or oppressed, but their efforts should not be extended to those who have been willfully guilty of an infraction of the local laws. It is their [diplomatic officers'] duty to endeavor, on all occasions, to maintain and promote all rightful interests and to protect all privileges that are provided for by treaty or are conceded by usage."²

§ 166. Consular Administration of Decedents' Estates.

Specific and detailed instructions are given as to the duties of consuls in caring for the estates of their deceased nationals dying intestate within their jurisdiction.³ The extent of their right to interfere, however, depends upon the applicable treaties and upon the local law.⁴ Foreign consuls in the United States, it seems, have not the right of consular administration as against a public or other administrator appointed under a state law by a probate court.⁵ This is believed to be the case even under the treaty of 1910 with Sweden,⁶ which gives extensive rights to consuls in the care of the estates of deceased nationals. When there is no conflict with local law, consuls have been held, under various treaties, to be entitled to appointment as administrators.⁷

¹ *E. g.*, Request for observance of art. XVI of the consular convention with Austria-Hungary, June 11, 1870, For. Rel., 1907, I, 52-55.

² Instructions to diplomatic officers, 1897, § 173.

³ R. S., § 1709.

⁴ Consular regulations, 1896, parag. 385-416. Instructions to diplomatic officers, 1897, §§ 184-185.

⁵ *Rocca v. Thompson*, 223 U. S. 317. See also *Matter of D'Adamo* (1914), 212 N. Y. 214, reversing 144 N. Y. Suppl. 429. See also Ludwig, Ernest, Consular treaty rights and comments on the "most favored nation" clause, Akron, 1913. This book, while crude, presents most of the American decisions in point.

⁶ Treaty of June 1, 1910, art. XIV, Malloy's Treaties, III (Charles), 112, 117. *Matter of D'Adamo*, 212 N. Y. 214; Justice Day's *dictum* in *Rocca v. Thompson* considered inapplicable.

⁷ *Austro-Hungarian Consul v. Westphal*, 120 Minn. 122, 139; *Matter of D'Adamo*, 212 N. Y. 214, 225 (*dictum*); *Matter of Holmberg's Estate*, 193 Fed. 260.

§ 167. Degree of Assistance in Certain Cases.

Unfair treatment to American concessionaires, whether under the guise of legality or not, will result in a protest from the Department of State. If merely a threatened infringement of American interests, good offices will be employed to prevent actual damage. If the violation of rights has occurred, the diplomatic action will assume more vigorous form, depending upon the flagrancy of the offense and all the circumstances of the case.¹

When the responsibility of a foreign government is moral, and not necessarily legal, the United States will nevertheless endeavor by all amicable means to obtain justice for its citizens. Thus, the accidental killing of an American naval officer by stray bullets from a French warship engaged in rifle practice induced the United States to appeal to the sense of justice of the French government to make reparation for the injury to the bereaved family.²

During the European war of 1914, numerous vessels carrying cargo belonging to American citizens were instructed to present their claims before the prize court by private counsel, with proof of ownership and the non-contraband character of the goods. The Department of State does not ordinarily intervene diplomatically to present the claims of individuals to prize, or indeed to any other courts; but it may, if requested, instruct the nearest consular officer to investigate and report upon the case to the Department, and informally to give notice of the claim to the court, or select some attorney to represent the owners before the prize court. It may be said that in all cases where American citizens are engaged in litigation abroad under circumstances rendering them subject to the local law and disentitled to demand diplomatic protection, the Department's assistance is confined to suggesting counsel, or, on request, engaging the services of an attorney. Obviously, however, the government assumes no responsibility for the integrity,

¹ See *N. Y. and Bermudez Co. claim v. Venezuela*; efforts of the Dept. of State to obtain justice for the company during the sequestration proceedings, Sen. Doc. 413, 60th Cong., 1st sess., 139, 140; *Guayaquil and Quito Ry. Co. v. Ecuador*, For. Rel., 1907, I, 385.

² Mr. Root, Sec'y of State, to Mr. McCormick, Nov. 13, 1906, For. Rel., 1907, I, 398, citing several cases in which the U. S. had voluntarily paid compensation to foreigners for injuries sustained through the carelessness of American officers.

competence or reliability of the counsel employed, nor for the financial responsibility of the employing client.

§ 168. The Backward Countries of Near and Far East.

In the case of semi-civilized or backward countries, as will be more fully observed hereafter, a greater degree of international responsibility is imposed upon the local government than in countries of normal development. For example, injuries to the person or property of American citizens in China lead to a demand for indemnity whether an official or individual was the actual wrongdoer, China being held liable practically as a guarantor of the security of foreigners. The weaker the control of the police, or the local safeguards for the protection of foreigners and the proper administration of justice, the greater and more rigorous becomes the diplomatic protection exerted by foreign governments and the harsher the demand for prompt satisfaction for violation of the rights of person or property of an alien. Thus, for the killing of American citizens in China, Turkey or Persia demands are made which would not be thought of in the case of a similar injury in a country of higher standards of civilized administration. Again, the majority of Latin-American countries are held by various countries of Europe to a higher degree of responsibility for injuries inflicted upon aliens than are countries like the United States or Canada. The demand in case of personal violence to an alien takes various forms, as has been observed in the study of the international responsibility of the state. Besides a claim for pecuniary indemnity, the demand may include the dismissal of delinquent police, the punishment of guilty offenders, and the institution of measures considered adequate or likely to prevent a recurrence of the offense. In the Labaree claim against Persia, the demand of the United States for indemnity was joined to a condition that "the amount of the indemnity should not be recovered by special tax, or by other device or pretext exacted from the innocent inhabitants of the province."¹ Only upon a backward country could such a condition be imposed.

¹ For. Rel., 1905, 722, 723. See also For. Rel., 1904-1907, under Persia. See peculiarly onerous conditions imposed on China for murder of a Chinese hospital student in 1898, For. Rel., 1898, 191-200.

§ 169. Miscellaneous Cases.

In the case of ordinary contract claims, as has been observed,¹ the government's interposition is usually confined to the use of good offices in behalf of American citizens. The circumstances under which more vigorous measures may be undertaken have been fully set forth in the study of contractual claims.

The Act of July 27, 1868² declared it to be the duty of the President, in case an American citizen is unjustly deprived of his liberty by the authority of a foreign government, to demand the reasons for such imprisonment, but prohibited his use of the military or naval power of the government to obtain his release. The extent to which the Department has exerted its power in behalf of American citizens imprisoned abroad will be considered presently.

The Act of 1868 also provided that naturalized citizens are entitled to equal protection abroad with native citizens. The title of naturalized citizens abroad to claim American protection is, however, largely affected by treaties and by the Act of March 2, 1907. It seems desirable to postpone for the present the study of the protection accorded to naturalized citizens.³

Under the guano acts, American citizens who discover guano are protected in the prosecution of their enterprise, which extends, however, only to the appropriation and removal of the guano.⁴

§ 170. Criminal Proceedings Abroad.

In cases of judicial proceedings against a citizen held under criminal charges the government, in countries where civilized justice is administered, usually confines itself to securing for the accused the guarantees of local law and the equality of treatment with natives which is generally provided for by treaty. Among other matters, the diplomatic or consular officer is instructed to see to it that accused persons are apprized of the specific offense with which they are charged, and for this

¹ *Supra*, §§ 112, 113.

² 15 Stat. L. 223; For. Rel., 1873, II, 1189.

³ See *infra*, §§ 231 *et seq.*

⁴ R. S., § 5570.

purpose the officer may seek the desired information from the local Ministry of Foreign Affairs.¹

When citizens are arrested on shipboard in foreign ports, American consular officers have no authority to approve or disapprove the proceeding. But in Latin-American countries a custom appears to have grown up not to cause an arrest on shipboard without first obtaining the consent of the minister or consul, and if this consent is refused, the arrest is rarely made. Where an arrest is about to be made in an arbitrary manner, not in accordance with proper action under legal process, the appropriate diplomatic or consular officer is instructed to protest with a vigor commensurate with the threatened unnecessary danger to life or property, and to report the matter to his government. Torture inflicted by an officer of justice upon an American citizen arrested on suspicion, to extort from him a confession of guilt, gave rise, in a case in Venezuela, to a demand for indemnity.²

The government may protest against an unduly protracted imprisonment,³ and request an early trial for its citizen. It may ask for his release on bail, where the cause of justice is thereby equally subserved, and may, if the quarters in which he is detained are unsanitary, request his removal to more comfortable quarters. This has occasionally been done in some of the countries of Latin-America. At the trial, notwithstanding frequent differences in criminal procedure from country to country, the government may demand that its accused citizen be confronted with the witnesses against him, and that he have the right to be heard in his own defense, personally or by counsel,—in other words, that he have a fair and impartial trial with the presumption of innocence surrounding him until his guilt is established by competent and sufficient evidence, and that the law be applied to him in a just and equitable manner. To assure the fairness of the trial, the government may send a consular or other representative to watch the proceedings.⁴ If the trial has been unjust, the government may demand a

¹ Cases in Venezuela, 90 St. Pap. 340, For. Rel., 1898, 1137 *et seq.* The Venezuelan Executive Decree of Nov. 13, 1912, art. 1, provides for giving such information. 8 A. J. I. L. (1914), Suppl. 175.

² For. Rel., 1884, 601.

³ *Ibid.*, 1901, 407-415.

⁴ Cases in China, 71 St. Pap. 950, Baty, *op. cit.*, 175. Austria-Hungary sent an

suspension of sentence, or if an unjust conviction was obtained, a suspension of execution. In the cases of certain sentences imposed upon American citizens by a court-martial in Cuba, the United States believed the sentences to have been unjust, and for the purpose of enabling it to arrive at a conclusion in the matter, asked the Spanish government for the record of the proceedings of the court, the charges and the evidence, and for information as to the opportunity defendants had to defend themselves by counsel of their own choice, and by examination and summoning of witnesses. In the meantime, a suspension of execution was demanded.¹ The government will also in appropriate cases insist that no cruel or unusual punishment be inflicted upon a convicted citizen. On several occasions, the Department of State has authorized the employment of the good offices of its diplomatic representative abroad in an endeavor to obtain executive clemency on behalf of a convicted American citizen.² A petition for a pardon is not, however, officially presented.

When the rights of an American citizen in connection with criminal proceedings have been infringed, the government may present a claim for a denial of justice. The extent of the reparation demanded naturally varies with the gravity of the offense and the extent of the injury. It may involve, besides a claim for pecuniary indemnity, a request for the removal and punishment of the guilty officer, and other forms of retribution designed to serve as a warning and to prevent a recurrence of the offense.

§ 171. Financial Relief.

The government is frequently called upon to provide financial relief or transportation to the United States to destitute or insane American citizens abroad. Except in the case of destitute seamen, however, "there is no general appropriation or authority for the relief by a diplomatic representative of a distressed citizen of the United States or

attorney to watch the trial of an American sheriff, charged with complicity in causing the killing of certain Austrian subjects in the Latimer riot cases. For. Rel., 1898, 111 *et seq.*

¹ *Competitor* case in Cuba, 1896, For. Rel., 1896, 711-746. See also Mr. Frelinghuysen, Sec'y of State, to Mr. Lowell, Dec. 11, 1883, For. Rel., 1883, 479.

² Moore's Dig. VI, § 921.

for furnishing him transportation home.”¹ Various governments of Europe make provision for the relief by consular officers of their indigent citizens abroad, and in 1873, President Grant urged Congress, without success, to grant authority for the extension of the same assistance to American citizens abroad.² The United States adopts the policy of taking care of indigent aliens³ as of indigent natives, although this is a matter within the jurisdiction of the states of the Union. The federal government, therefore, makes the same response to requests by state officials to secure the return to their native countries of aliens who have become public charges as it does to requests by foreign countries to provide for bringing back to this country destitute American citizens abroad, namely, that as there are no government funds available for bringing home destitute or insane American citizens, the United States cannot ask foreign governments to assume the expense of returning their indigent nationals in this country to their original homes. The government, however, always endeavors to communicate the needs of indigent American citizens abroad to their relatives or friends in this country, with a view to securing relief for the sufferers.

The United States cannot insist that a foreign government continue to support an indigent American citizen for any length of time, nor can it raise any objection to his being deported at the expense of the foreign government. Similarly, state officials and institutions cannot be compelled to harbor an alien who has become a public charge. The states will generally comply with the duties of humanity, but cannot be prevented from ridding themselves, at their own expense, of undesirable aliens who have become permanent public charges, by sending them to their original homes abroad. The obligation of repatriation, possibly the strongest right and duty incident to nationality, requires the state to receive its own citizen. Some foreign countries, *e. g.*,

¹ Instructions to the diplomatic officers of the U. S., 1897, § 175. For the provisions for the relief of destitute seamen and their transportation home, see Consular Regulations, 1896, arts. xv and xvi.

² Annual message of Dec. 2, 1873, Richardson's messages, vii, 191.

³ Moore's Dig. III, § 486. An exception is, of course, to be noted in the case of aliens who become public charges within three years after their admission. Such aliens may lawfully be deported. Section 20 of the Immigration Act of 1907, Bouvé, *op. cit.*, 699.

Russia and Luxemburg, provide by legislation for the return at public expense of their destitute nationals abroad.

In the matter of providing for insane persons, the states of the Union provide for the care of native and alien insane. The United States has no funds to reimburse foreign governments for the expense of maintaining American insane persons abroad, and the states of which these persons were residents, when called upon, have usually declined to undertake the burden. If confined in an asylum abroad, the federal government might be considered, under a liberal construction of the word "prisoner" as entitled to use the fund for the maintenance of prisoners, pending their return, for the care of incarcerated insane persons, pending their deportation to the United States. Up to the present time, however, it is not believed that the fund has been so employed.

The practice of foreign governments in regard to the maintenance and protection of their destitute or insane citizens abroad varies greatly. By treaty, they often provide for the reciprocal care of their respective pauper citizens or for their repatriation and the reimbursement to the other country of the expense of the temporary maintenance of indigent citizens. These treaties often enter into details concerning the expense of hospital treatment, poor relief, accident insurance, and similar matters. By municipal legislation, various degrees of protection are extended to their own indigent citizens abroad and to destitute aliens at home. In the case of their insane nationals, Russia and Luxemburg appear to provide for repatriation and reimburse the foreign country for the expense of their maintenance; Baden pays a *per diem* and repatriates within three months; Austria pays the expenses, but only if the family of the insane person is in a position to make reimbursement; Germany, Belgium and Italy repatriate their insane subjects but do not pay the expenses of their maintenance abroad; whereas Great Britain and the Netherlands follow the example of the United States by neither repatriating nor paying expenses.¹

In special emergencies the government, usually by Act of Congress, has provided for the relief and transportation to the United States

¹ The practice of the countries mentioned is that followed in their relations with France. Weiss, 2nd ed., II, 157; Tchernoff, 358-360. It may be that treaties with other countries modify this practice.

of destitute American citizens abroad. For example, Congress appropriated \$50,000 in 1897 for the relief of destitute Americans in Cuba,¹ to be expended at the discretion of the President "in the purchase and furnishing of food, clothing and medicines to such citizens, and for transporting to the United States such of them as so desire and who are without means to transport themselves." These appropriations are made in cases where considerable numbers of citizens are in want, rather than on behalf of specific individuals. In the latter cases, the Congress or the Department of State very rarely extends financial relief. On occasion, when an American citizen is on trial in foreign courts, and when the case seems meritorious, the Department has authorized the expenditure of small sums for counsel to defend him.² Similarly, where an outrage has been committed upon an American citizen abroad, the Department has authorized the American consul to spend a small amount to aid in finding the guilty offenders.³ Without special instructions from the Department, a diplomatic or consular officer has no authority to advance sums for the relief of American citizens abroad.⁴

¹ J. Res. 11, May 24, 1897, 30 Stat. L. 220. See also For. Rel., 1898, 998-1000. For relief to destitute Americans in Panama, 1889, see Moore's Dig. III, 809. See also J. Res. 342, Aug. 12, 1912, \$100,000, for transporting citizens fleeing from threatened danger in Mexico, 37 Stat. L. 641; J. Res. 47, Aug. 21, 1912, \$20,000, for subsistence of fleeing citizens, 37 Stat. L. 643; J. Res. 10, Sept. 16, 1913, \$100,000 for relief and transportation of destitute Americans in Mexico, 38 Stat. L. 238. Act of June 23, 1913, 38 Stat. L. 30, reimbursing Mexican Northwestern Ry. for transportation expenses. J. Res. 30 and 31, Aug. 3 and Aug. 5, 1914, appropriating \$250,000 and \$2,500,000, respectively for relief, protection and transportation of American citizens in European war area, 38 Stat. L. 776, with a proviso for reimbursement, if financially able. See Dept. of State circulars on relief, August, 1914, and executive order of August 5, 1914, No. 2012.

² *E. g.*, Gendrot's case, For. Rel., 1899, 271.

³ Gourd case in Mexico, October, 1913. In the Waller case in France, in 1896, the Ambassador was instructed to furnish security for costs in case Waller desired to bring an action against France or an individual in the French courts. The U. S. also furnished Waller and his family with subsistence and transportation. H. Doc. 225, 54th Cong., 1st sess., For. Rel., 1895, I, 251 *et seq.* The U. S. has no funds to pay expenses of sending witnesses abroad to testify in proceedings against assailants of American citizens. Balano case, 1913. A bill was introduced in the Senate by Sen. Weeks to have the U. S. refund expenses incurred in sending witnesses to Martinique.

⁴ Consular Regulations, 1896, § 360.

The inability of the government to pay the ransom demanded by the brigands who captured Miss Ellen M. Stone in Turkey in 1901 induced the Department to persuade private persons to raise the money by popular subscription, under a promise to endeavor to obtain reimbursement from a foreign government, if one could be held responsible, and if not, to urge Congress to make an appropriation reimbursing the subscribers. As it was decided that no foreign government could be held responsible, the President recommended a Congressional appropriation, but up to the present time the moral obligation of the government to make reimbursement has not been fulfilled.¹ In the cases of Col. Synge and Mr. Suter captured in Turkey in 1881 by brigands, and held for ransom, the British government paid a large ransom in each case, but demanded reimbursement from Turkey because of Turkey's neglect in taking proper steps to suppress brigandage. In paying these sums, the British government decided not to advance money in the future for the ransom of British subjects.²

MEASURE OF DAMAGES

§ 172. Direct and Indirect Damage.

In systems of private law, the measure of damages is usually the whole amount of the loss which is the natural result of the injury inflicted, including, therefore, both *damnum emergens* and *lucrum cessans*. International law, however, has provided no fixed measure by which damages may be assessed, but in this respect has followed the Roman and the civil law in vesting wide discretionary powers in the judge or arbitrator. The examination of a large number of arbitral decisions leads to the conclusion that the state is not charged with responsibility for indirect damages to the same extent as private individuals, the criterion of allowance depending largely upon whether they are proximate or remote, reasonably certain or speculative and consequential. The subject may best be considered in its relation to various types of cases.

The first great case in which the distinction between direct and in-

¹ Sen. Doc. 29, 63rd Cong., 1st sess., President's message, March 26, 1908. See Congressional Record, 62nd Cong., 2nd sess., v. 48, No. 218, Aug. 23, 1912.

² 72 St. Pap. 1167, 1175. See, however, *supra*, p. 220, note 1.

direct claims received thorough consideration was that of the *Alabama* arbitration before the Geneva tribunal, in which Count Sclopis, for the arbitrators, expressed the opinion that upon general principles of international law the indirect claims, arising out of (1) the loss due to the transfer of the American merchant marine to the British flag; (2) the enhanced payments of insurance; and (3) the prolongation of the war and the addition to the cost of the war and the suppression of the rebellion, did not constitute good foundation for an award of damages between nations.¹ This award, including the finding that "prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies," has been regarded as a reliable precedent by numerous other arbitral tribunals, which have disallowed indirect claims based upon loss of anticipated profits, loss of credit, and similarly consequential elements of loss.²

¹ Moore's Arb. 623, 646, 658; Moore's Dig. VI, 999. See Ralston, J. H., International arbitral law, ch. IX, and Moore's Arb., ch. LXX in which a good collection of awards relating to the question of damages may be found. The London Naval Conference of 1908-1909 decided to lay down no rules on the question of direct and indirect damages, but to leave the whole question of indemnity to the prize court. Renault's Report on Basis 12, Annexe 118, Cd. 4555 (Misc. No. 5), 1909, 338-339.

² *E. g.*, Tribunal between Great Britain and France of July 23, 1873, art. IV, dealing with British mineral oil claims, 63 St. Pap. 207 *et seq.*; 65 *ibid.* 426; Moore's Arb. 4938; La Fontaine, Pasicrisie int., 200. Commission "shall throw out claims concerning indirect losses or damages," etc., art. 3 of protocol of arbitration between France and Haiti, Sept. 10, 1913; Suppl. to 8 A. J. I. L. (1914), 145; Baldwin (U. S.) *v.* Mexico, Apr. 11, 1839, Moore's Arb. 2864 (whether loss of profits is a direct and immediate injury held to depend on local [Mexican] law); Brig *William* (U. S.) *v.* Mexico, Apr. 11, 1839, *ibid.* 4226 (prospective profits when vessel wrongfully detained disallowed); Mitchell (U. S.) *v.* Mexico, *ibid.* 4227; Hammaken (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 3471 (consequential damages considered of an uncertain and imaginative nature). See also Brooks (U. S.) *v.* Mexico, *ibid.* 4310; *Alabama* award, *ibid.* 658 (prospective earnings deemed to depend upon future and uncertain contingencies); Salvador Commercial Co. (U. S.) *v.* Salvador, Dec. 19, 1901, For. Rel., 1902, 857, 872 ("probable future profits of the undertaking" disallowed); Rudloff (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 182, 198 (loss of expected profits of a business venture, because unable to show that profits would have been made, disallowed); De Caro (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 810 (average profits disallowed, when other causes, *e. g.*, land warfare, might have prevented them); Kunhardt (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 63, 69 (loss of profits due to civil commotions); Poggioli (Italy) *v.* Venezuela, Feb. 17, 1903, *ibid.* 847 (disallowed, as indirect and uncertain, a claim for threats against claimants' debtors, inducing

Acts of Congress authorizing domestic commissions to distribute international awards have followed the general rule excluding anticipated profits and indirect losses from consideration as elements of damage. Thus, the Act of June 23, 1874 establishing the first Court of Commissioners of Alabama Claims confined the court's jurisdiction to claims "directly resulting" from damage caused by the so-called insurgent cruisers.¹ A similar jurisdictional clause is contained in the Act of March 2, 1901, creating the Spanish Treaty Claims Commission,² and in the Joint Resolution authorizing the Court of Claims to adjudicate claims against the Chinese Indemnity fund.³ Domestic commissions have reached the same conclusion without specific direction from Congress.⁴

them to refuse to pay their debts); *Costa Rica Packet* (Gt. Brit.) *v.* Netherlands, May 16, 1895, Moore's Arb. 4948; *Colombia v. The Cauca Co.*, 190 U. S. 524, 531. Rule 2 of the Nicaraguan Mixed Claims Commission of 1911 provided that the "Government is not responsible for *lucro cesante* (unaccrued or uncollected profits), or indirect damages suffered in business as a consequence of war. Tchernoff, *op. cit.*, 346-349; Leval, *op. cit.*, §§ 66 *et seq.* Doctrinal note on Don Pacifico case in Lapradelle and Politis' *Recueil*, I, 595, in which case consequential damages were collected by Great Britain. For. Rel., 1872, 244-246.

¹ Act of June 23, 1874, § 11, 18 Stat. L. 247. This clause was held to exclude a claim for loss of catch in consequence of a vessel being driven away from the scene of whaling operations. *Gannett v. U. S.*, Moore's Arb. 4295. For other claims considered as indirect injuries see *Hyneman v. U. S.*, *ibid.* 4292, Davis Rep. 45; *Phillips v. U. S.*, Davis' Rep. 56; *Haskins v. U. S.*, Moore's Arb. 4303 (vessel ran on bar and caught fire while attempting to escape from the *Shenandoah*); *Gannett v. U. S.*, No. 1321, *ibid.* 4305. The Act of June 5, 1882 (22 Stat. L. 98) creating the second court to distribute a large surplus in the Treasury was given jurisdiction over indirect claims arising out of "the payment of premiums for war risks." Moore's Arb. 4653, 4660.

² Section 11, 31 Stat. L. 879. "Award shall be only for the . . . actual and direct damage. . . . Remote and prospective damages shall not be awarded." See Brief of U. S. in Tolon, No. 124, June 8, 1904 on "loss of prospective profits and earnings."

³ S. J. R. 29, May 25, 1908, 35 Stat. L. 577, "excluding merely speculative claims and elements of damage." See *American Trading Co. v. Chinese Indemnity Fund*, 47 Ct. Cl. 563, 568.

⁴ The commission under the treaty with France of July 4, 1831 held that captured American "property" excluded allowance for commissions, profits, wages of seamen and a variety of contingent interests. Moore's Arb. 4472; Van Ness convention of Feb. 17, 1834, Act of Congress, June 7, 1836, Commissioner Henry's Final Report, Moore's Arb. 4542, 4545; The Peruvian indemnity of March 17, 1841, Act of Congress, Aug. 8, 1846, 9 Stat. L. 80; *Smith and Tracy*, Moore's Arb. 4597; *Macedonian*,

Speculative,¹ conjectural, and remote² damages have uniformly been disallowed by claims commissions.

§ 173. Circumstances under which Claims for Indirect Damages Allowed.

Notwithstanding numerous decisions which may be found to the effect that indirect losses do not constitute recoverable elements of damage, arbitral courts have nevertheless attempted in many cases to draw a distinction between indirect losses which may fairly be considered as certain, *e. g.*, the profits of an established business, and indirect losses which are speculative, imaginative and incapable of computation.³ The allowance of the former class of claims may indeed

ibid. 4603; Chinese indemnity under treaty of Nov. 8, 1858, Act of March 3, 1859, 11 Stat. L. 408, Report of Commissioners, Moore's Arb. 4628.

¹ Taussig (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3472; Mora and Arango (U. S.) *v.* Spain, Feb. 12, 1871, *ibid.* 3783; Oliva (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 781.

² Grant (Gt. Brit.) *v.* U. S., May 8, 1871, Hale's Rep. 162 (destruction of business); Pelletier (U. S.) *v.* Haiti, May 24, 1884, Moore's Arb. 1779 (alleged loss of investments of real estate, and claims in consequence of his imprisonment); Dix (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 7 (sale of cattle at inadequate price, owing to revolution); Oliva (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 782 (sale of business at reduced price to enable claimant to enter on a concession-contract with the government—too many elements may have contributed to reduce price); Valentiner (Germany) *v.* Venezuela, Feb. 13, 1903, Ralston, 564 and Plantagen Gesellschaft, *ibid.* 631 (loss of crop owing to draft of claimant's laborers); Monnot (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 171 (loss of business prospects); Bischoff (Germany) *v.* Venezuela, Feb. 13, 1903, *ibid.* 581 (injury to business resulting from unreasonable detention of property lawfully seized); Larrieu *v.* U. S., No. 468, Span. Tr. Cl. Com., Briefs XXIV, 138; Sen. Doc. 16, 58th Cong., 2nd sess. (Sec'y Hay on loss of traffic and business by cable company, whose cable was cut as an operation of war). Section 11 of Act of Mar. 2, 1901, 31 Stat. L. 879; Rudloff (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 182, 198 (*dictum*) and Poggioli (Italy) *v.* Venezuela, *ibid.* 847, 870 [loss of credit too remote, indefinite and uncertain; but see Irene Roberts case (U. S.) *v.* Venezuela, *ibid.* 144, and May (U. S.) *v.* Guatemala, Feb. 23, 1900, For. Rel., 1900, 648, 654, Moore's Dig. VI, 731, where under exceptional circumstances loss of credit allowed as element of damage]. China commissioners under Boxer indemnity disallowed claims based upon "general interruption of business." American Trading Co. *v.* Chinese Indemnity Fund, 47 Ct. Cl. 563, 568.

³ Such a distinction was drawn by Umpire Lieber in Rice (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3248 (*dictum*); Mora and Arango (U. S.) *v.* Spain, Feb. 12, 1871, *ibid.* 3783 (*dictum*); Rudloff (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 182, 198

be reconciled with the disallowance of the latter on the theory that they are proximate results of the original wrongdoing and were presumably or constructively within the contemplation of the parties. An examination of numerous cases in which such incidental losses have been allowed as elements of damage discloses a wide range of factors and the exercise of a wide discretion on the part of arbitrators.¹ While probable future profits may with some reason be disallowed, they may properly be taken into consideration in computing the value of a franchise or concession which has been unlawfully or arbitrarily cancelled.²

Expenses incurred in the presentation and prosecution of a claim have in many, although not in all cases, been allowed as recoverable

(*dictum*); Salvador Commercial Co. (U. S.) *v.* Salvador, Dec. 19, 1901, For. Rel., 1902, 872. See also Brooks (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 4309.

¹ Loss of employment arising out of illegal imprisonment (Gahagan, U. S., *v.* Mexico, Apr. 11, 1839, Moore's Arb. 3240). Loss of business resulting from wrongful arrest (Canty, Gt. Brit., *v.* U. S., May 8, 1871, *ibid.* 3309). Proximate and direct consequences of wrongful seizure of property, including a reasonable profit (Smith, U. S., *v.* Mexico, Apr. 11, 1839, *ibid.* 3374; Monnot, U. S., *v.* Venezuela, Feb. 17, 1903, Ralston, 170). "Full compensation" for the injury incurred (Barque Jones, U. S., *v.* Great Britain, Feb. 8, 1853, *ibid.* 3049). Cheek (U. S.) *v.* Siam, July 6, 1897, *ibid.* 1899, award 5068 (value of concession estimated by annual yield). Profits allowed in the form of interest (Bronner, U. S., *v.* Mexico, July 4, 1868, *ibid.* 3134). Loss of prospective output of mines, where there was an assured market (Martini, Italy, *v.* Venezuela, Feb. 13, 1903, Ralston, 819; but see Duffield, Umpire, in Orinoco Asphalt Co., Germany, *v.* Venezuela, Feb. 13, 1903, *ibid.* 586, 589, who only allowed interest on the amount for which the product of the mine would have sold during the suspension of operations. Cf. Ralston, International arbitral law, 170). "Derangement of [claimant's] plans, interference with his favorable prospects, his loss of credit and business" (Irene Roberts, U. S., *v.* Venezuela, Feb. 17, 1903, Ralston, 142, 145). Two years' loss of time, suspension of credit, grave anxiety of mind, and profits which would have been earned had not the Government prevented performance of the contract (May, U. S., *v.* Guatemala, Feb. 23, 1900, For. Rel., 1900, 648, 654, Moore's Dig. VI, 731). Consequences of unlawful detention of vessel, *e. g.*, repairs, wages of captain and crew (Orinoco Asphalt Co., Germany, *v.* Venezuela, Feb. 13, 1903, Ralston, 588). Loss and destruction of crops during period of compulsory abandonment of plantation (Poggioli, Italy, *v.* Venezuela, Feb. 13, 1903, Ralston, 870; Irene Roberts, U. S., *v.* Venezuela, *ibid.* 145). Loss of prospective catch when fishing vessels were improperly ordered out of fishing grounds before end of season, *infra*, p. 421.

² Salvador Commercial Co. (U. S.) *v.* Salvador, Dec. 19, 1901, For. Rel., 1902, 872. See also Navigation Co. *v.* U. S., 148 U. S. 312.

elements of damage.¹ When disallowed, the refusal may be justified on the ground that as a general rule of municipal law the costs and expenses of litigation other than the usual and ordinary court costs are not recoverable in an action for damages, and this ground has in certain cases been expressly advanced.² It will have been noted, however, that most arbitrators in the allowance of costs and expenses have been governed by equitable considerations rather than by this technical rule of law.

It will have become apparent from the foregoing endeavor to draw a distinction between proximate and remote damages, that notwithstanding the general agreement as to the principle, international tribunals in its application meet the same difficulty encountered by municipal courts³ when attempting to draw a line between injuries and losses which are sufficiently proximate and those which are too remote to be the foundation of an action. On the other hand, international tribunals do not necessarily apply the rule of municipal courts

¹ Allowed in *Baldwin (U. S.) v. Mexico*, April 11, 1839, Moore's Arb. 3235, 3240; *Augusta (U. S.) v. Mexico*, *ibid.* 4347 (including expenses of translation); *Potter, ibid.* 4227; *Mitchell, ibid.* 4228 and *Comp. Gén. des Asphaltes (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 331 (expenses of translation); *Stetson (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3131 (cost of printing); *Richter (Germany) v. Venezuela*, Feb. 13, 1903, Ralston, 575 (cost of taking additional testimony as directed by commission); *Louisa (U. S.) v. Mexico*, Apr. 11, 1839, Moore's Arb. 4325 (expenses incurred in efforts to obtain payment); *Poggioli (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 871 (expenses incident to submission of claim and to defense against wrongful charges); *Rebecca Adams (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2770 (expenses incurred to secure release of wrongfully detained vessel); *May (U. S.) v. Guatemala*, Feb. 23, 1900, For. Rel., 1900, 648, 654, Moore's Dig. VI, 731; *Cheek (U. S.) v. Siam*, July 6, 1897, Moore's Arb. 5068; *Costa Rica Packet (Gt. Brit.) v. Netherlands*, May 16, 1895, *ibid.* 4948 (expenses of recovery); *Salvador Commercial Co. (U. S.) v. Salvador*, Dec. 19, 1901, For. Rel., 1902, 872 (attorney's fees, and other costs); *Act of June 23, 1874 (attorney's fees)*.

² *Valentiner (Germany) v. Venezuela*, Feb. 13, 1903, Ralston, 562, 565 and *Bischoff, ibid.* 581. See also *Orr and Laubenheimer (U. S.) v. Nicaragua*, Mar. 22, 1900, For. Rel., 1900, 826 and *Masonic (U. S.) v. Spain*, Moore's Arb. 1069 (attorney's fees disallowed); *Bronner (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3135 (special circumstances governed); *Feuilletan (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 406; *British mineral oil claims (Gt. Brit.) v. France*, July 23, 1873, art. 4, Moore's Arb. 4939.

³ 8 Amer. and Eng. Encyc. of Law (2nd ed.), 563; *Scott v. Hunter*, 46 Pa. St. 192; *Smith v. Telegraph Co.*, 83 Ky. 104.

to the effect that a claimant must, so far as possible, be placed in the same condition as he would have been if he had been allowed to proceed without interference.¹ While there is a tendency, notably in contract cases, to follow the rule of municipal courts that where profits may fairly be computed they may be recovered, it cannot be said that there has been any close observance of the rule on the part of international tribunals.

§ 174. Punitive or Exemplary Damages.

Punitive or exemplary damages have been demanded by the United States and Great Britain in numerous cases where the injury to its citizens consisted in a violent and inexcusable attack upon their lives or property, where the defendant government seemed criminally delinquent, or where the citizen occupied a position carrying national dignity, such as a consul. Such outrages have been frequent in backward countries such as China, Persia and Turkey, the size of the indemnity demanded varying according to the circumstances.² As already noted, the reparation demanded may assume forms other than that of a mere pecuniary indemnity. Arbitral commissions, while often apparently taking into consideration the seriousness of the offense and the idea of punishment in fixing the amount of an award, have generally regarded their powers as limited to the granting of compensatory, rather than exemplary, damages. In some cases, they have in *dicta* considered that there was in a given case no justification for the award of punitive damages, indicating thereby that they might, in an appropriate case, have awarded exemplary damages.³

§ 175. Maritime Torts.

In the case of maritime torts, a long line of decisions of the Supreme Court has established the rule that the anticipated profits of a voyage

¹ *U. S. v. Smith*, 94 U. S. 214, 218; *Railroad Co. v. Howard*, 13 Howard, 307; *Howard v. Stillwell Tool Mfg. Co.*, 139 U. S. 199; *Anvil Mining Co. v. Humble*, 153 U. S. 540.

² See, *e. g.*, The Boxer indemnity of 1900, For. Rel., 1901, Appendix; Murder of French and German consuls in Salonica, 1876, 65 St. Pap. 949; Lienchou riot case, 1904, For. Rel., 1906, pp. 308, 319.

³ *Torrey (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 162; *Metzger (Germany) v. Venezuela*, Feb. 13, 1903, *ibid.* 578.

terminated by wrongful seizure or destruction of the vessel or cargo are not a proper element of damage,¹ but that the measure of damage is "the full value of the property injured or destroyed,"² to be ascertained by taking the actual prime cost of the cargo and vessel with interest thereon, including the insurance actually paid and such expenses as are necessarily sustained.³

Under a general rule of the law of carriers, the proper measure of damages is the value of the goods at the time and place where the carrier has contracted to deliver them. The commission under article VII of the treaty of 1794 between Great Britain and the United States, which provided for "adequate" and "full and complete" compensation held⁴ that the measure of damages for the unlawful seizure of cargo was "the net value of the cargo at its port of destination at such time as the vessel would probably have arrived there," in other words, the value of the merchandise plus the net profits if the voyage

¹ *Del Col v. Arnold*, 3 Dall. 333; *The Lively*, 1 Gall. 325; *The Anna Maria*, 2 Wheat. 327; *The Amiable Nancy*, 3 Wheat. 560; *La Amistad de Rues*, 5 Wheat. 385, 389; *The Apollon*, 9 Wheat. 362. Loss of freights were regarded as prospective profits and disallowed in *Canada (U. S.) v. Brazil*, Mar. 14, 1870, Moore's Arb. 1733, 1746; *Alabama* award, *ibid.* 658, and again, not gross freight, but only net freight, admissible. Papers relating to treaty of Washington, IV, 43. *Boyne, Monmouth and Hilja* (Gt. Brit.) v. U. S., May 8, 1871, Frazer's opinion, Hale's Rep. 252. Reasonable earnings were allowed in the *Masonic (U. S.) v. Spain*, award June 27, 1885, Moore's Arb. 1055, 1066; *Col. Lloyd Aspinwall (U. S.) v. Spain*, award Nov. 15, 1870, *ibid.* 1007, 1014. But see as to freights allowed, the *Highlander* and *Jabez Snow v. U. S.*, Act of June 23, 1874, Moore's Arb. 4272. Meaning of net freight was defined in *Winged Racer*, *ibid.* 4260, as follows: from the freight which a vessel, when destroyed, was engaged in earning, must be deducted the expenses which would thereafter have been incurred if the voyage had been successfully accomplished. Earnings of a return voyage were considered "prospective earnings." *Colby v. U. S.*, Moore's Arb. 4288; *Taylor v. U. S.*, No. 1942, *ibid.* 4290.

² *Del Col v. Arnold*, 3 Dall. 333; *The Apollon*, 9 Wheat. 362 (collision); *Smith v. Condry*, 1 Howard, 28 (actual damage at time and place of injury, and not probable profits at destination). See *Telegraph and Vaughn*, 14 Wall. 258; *Ocean Queen*, 5 Blatch. 493; *Rebecca Adams (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2770 (actual value of vessel seized plus 3 months' interest).

³ *The Charming Betsy*, 2 Cranch, 64.

⁴ *Betsey (U. S.) v. Great Britain*, Nov. 19, 1794, Moore's Arb. 4205, 4216; *The Neptune*, *ibid.* 4216, 4217. See also Rutherford, *Inst. of natural law*, I, p. 405, § 5, cited in the *Betsey* (Moore's Arb. 4206) to the effect that lost profits are a proper element of damage.

had not been interrupted. In the majority of cases, however, the prevailing rule in fixing the measure of damages for cargo unlawfully seized has been to take the cost of the goods at the port of embarkation plus a reasonable percentage for profit. This rule was followed in the case of *Ferrer v. Mexico*, the award embracing the value of the merchandise at the place of shipment, the cost of its transportation and ten per cent profit on the value, according to the practice of prize courts.¹

Several cases have occurred in which fishing and sealing vessels have been unlawfully prevented from plying their industry by being wrongfully ordered from the fishing grounds. The question as to whether such vessels are entitled to damages for loss of prospective catch was fully discussed in the cases of certain American sealing vessels ordered out of the Behring Sea by Russian cruisers in the early nineties, and in the arguments of Great Britain and the United States before the Behring Sea Claims Commission. The claims of the American vessels against Russia were submitted to the late Professor T. M. C. Asser as arbitrator and in all but one of the cases, he estimated the damages by the average catch of the season, making an allowance for the prospective catch of which the vessels had been deprived.²

¹ *Ferrer (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2721. The rule of the British admiralty court in the case of provision cargoes seized under the orders of April, 1795, was to allow the invoice price plus 10 per cent. See the *Betsey v. Great Britain*, Nov. 19, 1794, Moore's Arb. 4208.

In the case of goods destroyed by the Confederate cruisers, adjudicated by the court of commissioners of *Alabama* claims, the measure of damages was deemed the value of the goods at the time and place of shipment, with charges and marine insurance actually paid, with interest on the aggregate thus produced from the time of shipment to the date of destruction, at 6 per cent. *Winged Racer v. U. S.*, Act of June 23, 1874, Moore's Arb. 4242. The court was prohibited from making allowance for prospective profits.

² The *Cape Horn Pigeon*, the *James Hamilton Lewis* and the *C. H. White* were allowed substantial damages for prospective catch. The *Kate and Anna* claim for catch was disallowed because on warning the captain had returned home instead of fishing elsewhere as he might have done. For. Rel., 1901, appendix. In four cases before the Behring Sea Claims Commission, it seems, awards were made for prospective catch lost by heeding warning to cease fishing, Convention of Feb. 29, 1892, Moore's Arb. 4764, 945. Congress in making the appropriation to pay the Behring Sea awards (June 15, 1898, 30 Stat. L. 470) expressly declined to admit any liability "for any loss of prospective profits to British vessels engaged in pelagic fur sealing."

Where vessels have been wrongfully taken from their regular course and detained or used for a special purpose, damages in the nature of demurrage for the detention or time of employment have been allowed against the captors who had made the unlawful seizure.¹ In making this allowance for time lost, the court may properly take into account the nature of the business in which the vessel is engaged. Thus, the court of commissioners of *Alabama* claims made an allowance in lieu of catch to the owners of fishing vessels taken from their regular occupations, and the allowance was not considered in the nature of prospective gains.

§ 176. Ordinary Contract and Tort Claims.

No definite rule as to the measure of damages in cases of contract or tort can be asserted. It may be said, however, that the loss of probable profits is more generally compensated in cases of breach of contract than in tort cases, because the profits of a business enterprise are presumed to have been within the contemplation of the contracting parties. The decision of the United States Supreme Court in the case of *Howard v. Stillwell Tool Manufacturing Co.*² has on several occasions been referred to with approval by claims commissions:

"It is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness; or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into."

Prospective damages were allowed in the Halifax Fisheries award. In the *Costa Rica Packet* (Gt. Brit.) *v. Netherlands*, May 16, 1895, Moore's Arb. 4948, it seems quite probable that M. de Martens made some allowance for prospective catch. The court of commissioners of *Alabama* claims, who, under the Act of 1874 were prohibited from making allowances for prospective profits, disallowed several claims for loss of prospective catch of fish. The *Alert*, Moore's Arb. 4288; Gannett, *ibid.* 4299; Osborn, *ibid.* 4305.

¹ *Schooner Lively*, 1 Gall. 315; *Corier Maritimo*, 1 C. Rob. 287; *Ships James Maury, General Pike* and others, Court of *Alabama* claims, Act of June 23, 1874, Moore's Arb. 4228; *Baron de Castine v. U. S.*, *ibid.* 4303. A similar rule has been applied in collision cases. *The Gazelle*, 2 W. Rob. 279; *Williamson v. Barrett*, 13 How. 101.

² 139 U. S. 199. See *Martini (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 819, 843.

In cases of breaches of concession contracts the ordinary rule in contract cases has been followed, namely, to allow the reasonable value of the concession, based on its expected profits, and not merely the amount already spent on the works.¹

In estimating the value of a business which may have been destroyed either through breach of contract or by tortious act, it is not unusual to fix the value of the good-will of the business by taking into account the amount of average annual profits.

It is equally difficult to bring within any established rule the measure of damages in tort cases, inasmuch as each case depends upon its own peculiar facts, and inasmuch as arbitrators exercise a wide discretion in determining the elements of loss which may enter into the allowance of compensation. The extent to which prospective profits and indirect losses may enter into consideration has been mentioned.

§ 177. Personal Injuries.

The commission passing upon alien claims against China arising out of the revolution of 1911 recommended that the rules adopted by the Crown Advocate of the British government in adjudicating the Boxer claims be followed, namely: in case of partial disablement, he obtained, wherever possible, "evidence as to the extent to which the life of the claimant was, from an insurance point of view, damaged; that is to say, the amount of extra premium which an insurance office would demand of the claimant, if otherwise sound, applying for a policy on his life, the extent of which they would 'load' the policy. The sum on which [his] calculation was based being that in which the claimant would naturally, from his position in life, take out a policy if about to marry, [he] then allowed the capitalized value of these extra premia as compensation for the injury received."²

In cases of false arrest or imprisonment, the decisions of arbitrators exhibit a wide range of estimates upon the value of individual liberty and the indignity suffered by a wrongful arrest and detention. Umpire Plumley in the case of Topaze, before the British-Venezuelan com-

¹ In the case of *May (U. S.) v. Guatemala*, Feb. 23, 1900, For. Rel., 1900, 648, 654, \$41,588 was allowed by the arbitrator for profits which would have been earned had not the government prevented the performance of the contract.

² From Report of Mr. Wilkinson, Crown Advocate.

mission of 1903,¹ after an examination of some sixteen cases, concluded that \$100 per day for unlawful detention seemed the sum most generally acceptable to arbitral tribunals.² The awards for unjust arrest and imprisonment, however, have varied greatly in amount, depending upon the arbitrariness of the arrest, the physical or moral suffering connected with the imprisonment, the duration of the imprisonment, the official character or station in life of the person arrested or detained, the necessary consequences of the deprivation of liberty, and other special circumstances.³ Reference has already been made⁴ to the provision of municipal law in most of the countries of Western Europe and in some of the states of the United States indemnifying from the Treasury of the State a person who has been unjustly convicted and imprisoned.

The measure of damages for tortious injuries resulting in death is based upon various factors, *e. g.*, the age and station in life of the deceased, the expectation of life of the deceased and of his surviving beneficiary, the deprivation of comforts and companionship to those surviving, their degree of relationship to the deceased, shock to the surviving members of the family, and other considerations. The subject received careful attention in the cases of *Di Caro and Brun against Venezuela*.⁵ In deaths due to the Boxer uprisings, the Department of

¹ *Topaze (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 329, 331.

² See the summary of cases collected in the footnote to *Giacopini (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 765, and in Ralston's *International arbitral law*, pp. 177-180. See also Moore's *Arb.*, ch. LIX.

³ See 22 *Op. Atty. Gen.* 32, case of *T. J. Culliton*.

⁴ *Supra*, p. 129.

⁵ *Di Caro (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 769, 770; *Brun (France) v. Venezuela*, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 5-30. Besides the cases referred to in Ralston's *International arbitral law*, pp. 176-177, the following cases may be mentioned: *Maninat (France) v. Venezuela*, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 69-80; 100,000 francs allowed; *Vexincourt case*—Germany paid France 50,000 francs, for widow of person shot on French soil by German sentry on German territory, *Oppenheim*, I, 209; *Pears' case v. Honduras*, 1899, Moore's *Dig.* VI, 762 (shot by sentry without justification and contrary to military regulations. Sentry tried and acquitted. \$10,000 indemnity obtained); *Etsel case v. China* (\$25,000 Mexican offered by China for the unpremeditated killing of this war correspondent by Chinese soldiers—soldiers were also punished), *For. Rel.*, 1904, 168 *et seq.*; *Amelia Tejida de Govin v. U. S.*, Spanish Tr. Cl. Com., \$20,000 for the killing of her son in Cuba by Spanish troops; *Cornelia Alvarez de Otazo* and eight

State awarded \$5,000 each to the relatives or estates of eighteen adults, it appearing that the deceased left surviving no husband, wife or child. For the killing of several children, \$2,500 each was awarded. The commission had in most cases allowed larger sums, based on expectancy of life and other considerations, but the Department in revising the awards, fixed the value of an adult life at \$5,000 and that of a child at \$2,500. The British and French governments appear to exact the best indemnity, based upon expectancy of life and earning capacity, and in flagrant cases, add exemplary damages. The commission passing upon the claims arising out of the Chinese revolution of 1911 recommended the adoption of the rules adopted by the Crown Advocate of the British government in adjudicating the Boxer claims, and presented in his report: ¹

“Claims for compensation for the death of relatives fall naturally into two classes: Claims on behalf of the children of murdered parents and those by other relatives for loss of support, total or partial, actual or reasonably prospective, rendered or undertaken by those killed.

“Death claims on behalf of children were dealt with as follows: The children’s ages and the station of life of the parents being ascertained, a sum equivalent to the present value of an annuity at three per cent. of whatever sum was necessary and fitting for the education of each child for the number of years to elapse before attaining the age of twenty-one was calculated and allowed. In addition to this, such sum was allowed as would, invested at compound interest at three per cent. for the same number of years, provide for each child at twenty-one a necessary and fitting sum for his advancement in life.

“In dealing with death claims on behalf of relatives, the age of the beneficiary was ascertained and also the actual or average annual sum received from the deceased, the average expectation of life of a person of the claimant’s age being taken, a sum equal to the present value of an annuity for such number of years at three per cent. of such annual sum was awarded. In case of prospective benefit to have been received if the murdered person had lived, the sum promised or reasonably expected to be paid by the deceased was taken as a basis of calculation.”

children, *ibid.*, \$30,000 for the killing of husband and father by Spanish guerillas in command of an officer; *Rand v. Panama*, \$8,000 indemnity for killing of American sailor by mob in Panama, *For. Rel.*, 1909, 472; Firing by Russian fleet on British fishing vessels in North Sea, 1904—the Dogger Bank incident; £65,000 paid by Russia for killing of two fishermen and damage to several boats.

¹ Extract from report of Mr. Wilkinson, Crown Advocate of the British government.

§ 178. Measure of Damages on Claims Arising out of Chinese Revolution of 1911.

It may not be without interest to note the extent of the losses for which indemnities were allowed by the Claims Commission of the Diplomatic Body in Peking passing upon the claims arising out of the Chinese revolution in 1911. Inasmuch as China, a weak country, was presumably given very little opportunity to object to the principles of liability determined upon, it may be assumed that these rules represent the widest measure of damages assessable against a government.

In the case of merchandise destroyed or looted, the commission agreed that the owner ought to be entitled to compensation equal to the market value of the goods prevailing at the time of loss, or in the case of export goods, to the contract price. In the case of damages caused to foreigners by the destruction, deterioration or loss of property, held by them as security, it was understood that the indemnity payable on that account cannot exceed the amount of the debt for which such security was given. Indemnity was to be allowed for the expenses incurred by foreign municipalities for the protection and defense of their property. In the case of private persons and firms, property losses indemnified included goods, personal effects, money and documents of commercial value, salaries and other payments due under contract to foreigners in Chinese government service or institutions unpaid owing to the Revolution; actual loss for non-fulfillment or delay in execution, owing to the Revolution and through no fault of the foreign claimants, of contracts and other engagements entered into by foreign firms and individuals with the Chinese government, such loss including freight, reshipment, storage, insurance and loss or deterioration of goods; travelling expenses of foreigners in Chinese official service to an adjacent place of safety and return journey, extra living expenses during absence, and rent of houses; deposits of money or investments in Chinese government banks or other government departments, not recovered; actual loss in industrial enterprises, such as damage to and deterioration of machinery and materials, resulting from unavoidable suspension or delay in working owing to local revolutionary disturbances; rents not recoverable and rents paid in advance where occupa-

tion and use were actually prevented by military operations or the acts of Chinese soldiers.

Among the elements of injury for which compensation was in principle *not* allowed were 1, the losses of foreign municipalities arising out of (a) diminution of municipal income; (b) the rents of houses paid in advance where occupation was prevented; and (c) salaries and wages of employees whose services could not be turned to account owing to the Revolution; and 2, the losses of foreign corporations, firms and individuals based upon (a) telegrams and similar charges necessitated by the abnormal state of affairs; (b) prospective profits not realized owing to non-fulfillment or delay in the execution of contracts or other engagements entered into by foreigners with other foreigners or Chinese persons; (c) extra living expenses incurred by foreigners owing to enforced absence from the usual place of residence, and similar expenses incurred on behalf of servants and employees; (d) expenses of removing property to a place of safety and replacing it; (e) expenses incurred for reduction of staff, and extra wages for employees; (f) freight, insurance and storage of stock-in-trade which could not be realized or suffered depreciation and expenses through congestion of stock; (g) interest on capital which could not be utilized owing to the revolutionary troubles;¹ (h) loss of prospective profit owing to partial or wholesale deterioration of stock-in-trade; (i) loss owing to fluctuation of exchange, appreciation or depreciation of market prices and appreciation of freight and transport; (j) additional wages necessitated by the rise in the price of labor. Other claims disallowed were those for principal and interest on provincial loans unpaid, loss owing to inconvertibility or depreciation of Chinese government and provincial bills and paper money attributed to the Revolution, and claims in respect to alleged illegal and unwarranted imposition of taxes during the disturbances. Certain other claims which were considered as possibly not attributable to the Revolution were left open.²

¹ Cf. *American Trading Co. v. Chinese Indemnity Fund (Boxer fund)*, 47 Ct. Cl. 563, 568.

² Private correspondence from Peking, China. Cf. the report of the international claims commission passing upon the Boxer claims, Mar. 8, 1901. *For. Rel.* 1901, App., H. Doc. 1, 57 Cong., 1st sess. 106-108; Leval, *op. cit.*, 110-118; paraphrase in 96

INTEREST

§ 179. Absence of any Settled Rule of Allowance.

Except in the case of torts based upon injuries to the person, Foreign Offices usually demand interest from the date the claim arose until the date of payment, and international tribunals have often allowed interest, notwithstanding the absence of any settled rule on the question.¹ Several commissions, however, have refused to allow interest on the ground that interest is a matter of contract and that in the absence of a provision for interest in the protocol under whose authority the commission operates, interest cannot be allowed to one of the contracting parties against the other.²

Those commissions which have allowed interest have proceeded either under express authority of a protocol, or on the theory that "compensation" includes interest for the improper withholding of satisfaction, either by the failure to make prompt payment of money when due, or the wrongful detention of property.

Several commissions have refused interest on the ground that the claimant had been guilty of laches in presenting his claim to the government, or in refusing to accept a voluntary offer of settlement.³ Numerous commissions, especially in contract cases, have applied the rule that a government is only chargeable with interest from the time a demand of payment has been made, or the government put upon notice of the existence of a claim.⁴

St. Pap. 1077-78. For the losses excluded from indemnity by the International Claims Com. following the insurrection of 1882 in Egypt, see 74 St. Pap. 1091, 1094.

¹ A valuable summary of awards on the question of interest is to be found in Ralston's International arbitral law, 82-87. Ralston presents a list of commissions in which interest has been allowed on awards, and includes the rates of interest. See also Moore's Arb. 4313-4327, in which the opinion of the commissioners under art. VII of the treaty of Nov. 19, 1794 is given. In the Case of the U. S. in claim of Alsop v. Chile, Dec. 1, 1909, point IV, pp. 315-322, the opinions of publicists and the practice of arbitral tribunals in support of the allowance of interest are set forth. See also the valuable opinion of Umpire Plumley in the Motion for Interest claim (Gt. Brit.) v. Venezuela, Feb. 13, 1903, Ralston, 413-423.

² See Plumley in Motion for Interest opinion, Ralston, 413-423 and authorities there cited. See also Christern (Germany) v. Venezuela, Feb. 13, 1903, Ralston, 525, and Atty-Gen. in Peruvian Indemnity awards, Moore's Arb. 4595.

³ Awards in Ralston's International arbitral law, § 164, p. 84.

⁴ See Ralston, *op. cit.*, § 168, p. 86, and especially Cervetti (Italy) v. Venezuela,

An exhaustive discussion of the liability of a government to compensatory interest for the failure to fulfill a pecuniary obligation was undertaken by the Hague Court of Arbitration in deciding the claim of Russia against Turkey based upon the non-payment of interest on a certain war indemnity exacted in the treaty of peace between those countries of Jan. 27-Feb. 8, 1879. The tribunal held that even in the absence of an express stipulation, interest is due by international as by municipal law, for the debtor's improper withholding of a debt from his creditor, but that interest runs only from the date when payment is expressly demanded. In view of the fact, however, that for eleven years only the unpaid principal had been demanded by Russia in various extensions of the time of payment, the tribunal drew the legal presumption that Russia had relinquished all claim to interest.¹

Interest has been allowed for various periods, beginning sometimes from the date of the original injury, and more often, from the date of notice of the claim, unless otherwise provided by contract. The period during which interest runs has at times been held to terminate at the date of payment of the principal and sometimes at the date when the commission concludes its labors, depending largely upon the jurisdiction of the commission.² Commissions have refused to compound interest.³

The rate of interest, when allowed, has generally varied from three to six per cent, although on occasion eight and twelve per cent interest has been granted.⁴ There is no settled rule as to the rate of interest,

Feb. 13, 1903, *Ralston*, 658, 663, and *Christern (Germany) v. Venezuela*, *ibid.* 523.

¹ *Russia v. Turkey*, July 22/August 4, 1910, award Nov. 11, 1912; 7 A. J. I. L. 178, 188 *et seq.* 200. See also Robert Ruzé in 15 R. D. I., 2nd ser. (1913), 351-371. Turkey's contention that states differ from individuals as debtors, in that they are not liable to pay interest on unfulfilled obligations, was expressly denied. By granting an extension of time in the payment of the debt, Russia was held to have released its claim for accrued interest. See also *Law Mag. and Rev.*, Aug., 1914, 464. The decision appears to have followed the principles of French private law.

² *Ralston*, *op. cit.*, §§ 169-171.

³ *Ralston*, *op. cit.*, § 166.

⁴ Eight per cent by the Spanish-American commission of 1871, *Moore's Arb.* 3763; 12 per cent by the Chinese indemnity domestic commission under treaty of 1858, *ibid.* 4629. The Boxer Claims Com. of 1900 (*For. Rel.*, 1901, Appendix, 107), allowed 5 per cent on personal, and 7 per cent on commercial claims.

although numerous commissions have adopted the rate prevailing in the place where and at the time when the claim arose.

EXTRATERRITORIAL PROTECTION ¹

§ 180. Protection Amounting to Jurisdiction.

The widest range of the protective function is to be found in the exercise of extraterritorial jurisdiction by the countries of European civilization, through their diplomatic and consular representatives, in certain countries of the Orient.² The exercise of this jurisdiction involves in large degree a withdrawal of the nationals of the countries enjoying extraterritorial rights from the local jurisdiction of the authorities of the country of residence, and a subjection of these foreigners to the jurisdiction of their own diplomatic and consular officers in certain classes of cases and for certain purposes. These exceptional privileges of foreigners in certain Oriental countries are based either on custom and treaty, as in Turkey, or on treaty alone, as in China. The reason for their exemption from the local jurisdiction is to be found in the diversity of law, custom and social habits of the people of European civilization for whose benefit the extraterritorial privileges were secured. For many purposes, these foreigners are subject to their national law,³ administered by their own consuls or diplomatic officers.

¹ The technical distinction between exterritoriality and extraterritoriality is discussed by Piggott in his work on *Exterritoriality* (new ed.), London, 1907, p. 3, note.

² Moore's *Dig.* II, §§ 259-290; H. Doc. 326, 59th Cong., 2nd sess., 196-247; Hinckley, F. E., *American consular jurisdiction in the Orient*, Washington, 1906; Brown, Philip M., *Foreigners in Turkey; their juridical status*, Princeton, 1914; Hall, W. E., *Foreign powers and jurisdiction of the British Crown*, Oxford, 1894, p. 132 *et seq.*; Piggott, F., *Exterritoriality*, new ed., London, 1907; Jenkyns, Henry, *British rule and jurisdiction beyond the seas*, Oxford, 1902, p. 150 *et seq.*; Arminjon, P., *Étrangers et protégés dans l'Empire Ottoman*, Paris, 1903; Lippmann, K., *Die Konsularjurisdiktion im Orient*, Leipzig, 1898; Pelissié du Rausas, G., *Le régime des capitulations dans l'Empire Ottoman*, 2nd ed., Paris, 1910, introduction to v. 1; Rey, F., *La protection diplomatique et consulaire dans les Echelles du Levant*, Paris, 1899.

³ See Act of August 11, 1848, 9 Stat. L. 276 and particularly R. S., §§ 4083-4130; see also Act of June 30, 1906, 34 Stat. L. 814, creating U. S. court for China; Hinckley, p. 41 and Appendix I-III; H. Doc. 326, 59th Cong., 2nd sess., 216-246, contains treaties, statutes and regulations relating to extraterritorial jurisdiction of the United States.

§ 181. Sources of Extraterritorial Rights.

The extent of the extraterritorial jurisdiction of the United States in a given country is to be found in the treaty conferring extraterritoriality and in the statutes and regulations of the United States providing for the exercise of this jurisdiction by American diplomatic and consular officers.¹ Such extraterritorial jurisdiction is exercised in conformity (1) with the laws of the United States, and, if they are unsuitable or deficient, (2) with "the common law, and the law of equity and admiralty," and if all these do not furnish appropriate and sufficient remedies, (3) with "decrees and regulations" having "the force of law," which the "ministers" may make to "supply such defects and deficiencies."²

Besides the consular jurisdiction exercised over nationals, a wide degree of protection is extended by consuls to the subjects of non-treaty powers and even to natives in the employ of foreigners. This protection of non-nationals, which differs from jurisdiction, will be discussed hereafter.³

The so-called extraterritorial rights, resting in their origin upon treaty, have in the course of time, particularly in Turkey, Morocco and other countries, gathered around themselves by custom an accretion of further encroachments upon the local jurisdiction, so as to constitute in some countries a veritable *imperium in imperio*. Apart from all consideration of the justice or desirability of the step, one can understand and sympathize with the attempt of the Turkish government to rid itself—as it undertook to do by notification to the Powers shortly after the outbreak of the European War of 1914—of the serious encroachments upon national sovereignty imposed by the Capitulations.⁴ The contention of the United States, to the effect that a treaty cannot be abrogated by a unilateral act, in the absence of specific stipulation, will serve to keep the matter in abeyance for

¹ The federal government, as a matter of constitutional law, has the right to determine when and under what circumstances the rights of extraterritoriality will be exercised.

² R. S., § 4086; 7 Op. Atty. Gen. 503; Moore's Dig. II, 614.

³ *Infra*, p. 467.

⁴ See an interesting note in 40 Law Mag. and Rev. (November, 1914), 84, and a discussion by Brown, Ph. M., *Foreigners in Turkey*, 112-118.

the present. The success of Turkey's attempt will probably depend largely upon the outcome of the European War.

§ 182. Origin and Development of the System.

The purpose of the extraterritorial privileges was quite different in origin from their present *raison d'être*. As early as the twelfth century various Italian cities had obtained from the Greek Christian rulers at Constantinople and later from their Mohammedan conquerors numerous charters or capitulations for the protection of their commerce, and exemption for their merchants in the Levant from the local jurisdiction.¹ In the development of this system after the Moslem conquest, the exemption was based on a presumed inferiority of the western merchants as unfit to share in the privileges of Moslem law, so largely religious in character, resembling, in this respect, the grant of the *jus gentium* to foreigners at Rome, because they were considered unfit to share in the privileges of the *jus civile*. The spread of the system, however, is founded upon the desire of countries of the western world to protect their nationals from the operation of unfit or unequal laws and from the danger of corrupt and ignorant local courts.² The exercise of extraterritoriality found an early prototype in the quasi-judicial functions which foreign consuls had been accustomed to exercise in European ports as between merchants of their own country.

Beginning with the capitulations in favor of the Italian republics, the system extended gradually to the nations of modern Europe. The Turkish capitulations in favor of France from 1535 on became the basis for the treaty rights of other powers.³ The extraterritorial rights of the United States in Turkey are based principally on the treaty of 1830.⁴ As early as 1787, however, the United States concluded a treaty with Morocco securing the privileges of extraterritoriality, followed in 1797, 1805 and 1815, by treaties with Tunis, Tripoli and Algiers

¹ Hinckley, 2; Pelissié du Rausas, v. I, introduction.

² Hall, 135.

³ Hinckley, 7; Brown, 33 *et seq.*

⁴ Philip M. Brown has recently written an interesting work on the legal status of foreigners in Turkey (Princeton, 1914) in which the much disputed question of the rights of American citizens under art. IV of the treaty of 1830 is discussed. See pp. 76-80.

respectively. In 1844 the system was extended by treaty to China, and in 1857-1858 to Japan, in which country it has since been abandoned.¹ The United States now exercises extraterritorial jurisdiction in Turkey, Bulgaria, China, Persia, Siam and Maskat. Owing to the many changes in the international status of the oriental countries with which the United States has negotiated treaties of extraterritoriality, extraterritorial jurisdiction is now either suspended or greatly modified in its exercise in Zanzibar, Borneo, Tonga, Tripoli and Morocco and has been entirely relinquished in Algiers, Japan, Korea, Madagascar, Roumania, Samoa, Servia and Tunis.²

It is obviously beyond the scope of this work to analyze the provisions of the treaties and statutes to determine in each particular country the extent of extraterritorial jurisdiction.³ The extraterritorial privileges usually include an exemption from the jurisdiction of the courts of the oriental state; inviolability of the domicile; freedom from arrest by native officials, except when in the act of committing a flagrant crime; if arrested, the right of surrender to the consul for trial and punishment; criminal or civil trial in consular or national courts of the accused or defendant; general jurisdiction of the foreign consul over his nationals, with right to require the assistance of the local authorities; and notification of the consul in case of the arrest of native employees of an American citizen.⁴

Hall mentions certain privileges which Great Britain and a few other favored nations possess to prevent an oppressive exercise of power on the part of the local authorities. Thus, in the territories to which the Capitulations extend, the local police are forbidden to enter by force the house of a British subject without notice to the ambassador or consul; or where a criminal is arrested *flagrante delicto*, notice of the arrest must be given to the consul within twenty-four hours. In

¹ By the treaty of Nov. 22, 1894; Hinckley, 183.

² Hinckley, 40; H. Doc. 326, 59th Cong., 2nd sess., 214-222, and citations to Hinckley; Moore's Dig. II, §§ 271, 282, 283, 284.

³ This has been done by Hinckley and Brown for the United States in particular, and for various European countries by the authors cited in note 2, p. 430. As to extraterritorial jurisdiction in China, see especially Koo, V. K. W., *Status of aliens in China*, New York, 1912, ch. IX-XII; and in Turkey, Brown, *op. cit.*, ch. III and IV.

⁴ Hinckley, 2 and H. Doc. 326, 59th Cong., 2nd sess., 202, quoting Atty. Gen. Cushing in 7 Op. Atty. Gen. 565, 569 and Hall.

Persia, formal authorization from the minister or consul is required. Ships and their boats are assimilated to houses.¹ A certain degree of protection is thus extended to things and places as well as to persons.

This brief study of extraterritorial protection emphasizes the fact that the degree of diplomatic protection exercised in a given country is in inverse ratio to the degree of local security enjoyed by foreigners under the municipal law and institutions of the country of residence.

¹ Hall, 143; H. Doc. 326, 59th Cong., 2nd sess., 209; Brook in 30 Law Mag. and Rev. 170.

CHAPTER VI

MEANS OF PROTECTION

§ 183. Agencies of Protection.

International law has created various agencies which serve states to fulfill their function of protecting citizens abroad. The diplomatic and consular service, acting as the instrument of the Foreign Office, is the customary channel through which the rights of nationals are safeguarded and protected. The rights of aliens—or citizens abroad—are defined in the municipal law of each country, subject to the limitations imposed by the obligations of international law and of treaties. Treaties, therefore, which prescribe the reciprocal rights of nationals of one of the contracting parties in the country of the other, and of consuls of each country acting in special matters on behalf of their nationals, may appropriately be considered as a means of protection. The exercise of consular jurisdiction, with the wide range of powers involved in the protection of citizens as well as non-nationals in countries where extraterritorial privileges are enjoyed, and the exercise of the right of asylum in legations and public vessels—a practice universally discouraged by the United States as to non-nationals but still granted occasionally by many countries in backward states and (by inheritance and tradition, rather than justice) in the republics of Latin-America—may be deemed institutions of international law designed to afford adequate protection to citizens and others requiring diplomatic assistance. Delegated protection, by which the consuls and diplomatic officers of one country assume, by request, the protection of the interests of the citizens of another country, and joint protection, are other methods of protecting citizens in certain emergencies.

§ 184. Consular Service.

One of the most important agencies for the protection of citizens

abroad is the consular service.¹ While the consul has no diplomatic or representative character, and his political functions are limited, the considerable number of consuls and their location in the more important commercial centers results in a closer relation between a consul and his fellow-citizens abroad than is possible for a diplomatic officer. Treaties and custom, therefore, confide to the consul a wide range of protective functions, short of the presentation of diplomatic claims or the making of representations to the central government.

Consular conventions usually provide that consuls shall have the right to address the local authorities in their districts in remonstrance against infractions of international law or of the treaties existing between the two countries, and against whatever abuse may be complained of by their countrymen. The consul's activity is usually confined to individual cases, the larger questions connected with a general violation of treaties or of international law being handled by the legation with the central government. The local authorities are usually required by treaty to give the consul information concerning his countrymen, to notify him of deaths, to permit him to intervene in the care of a deceased national's estate and, under certain circumstances, to appoint him administrator.²

The Italian government, one of the most watchful of all governments in the protection of its subjects abroad, has within recent years established legal bureaus in connection with its principal consular offices in the United States, with a view to conserving the legal rights of its many subjects in this country, and in case of their death, the rights of their Italian heirs and successors. An excellent system enables consuls to learn quickly of the difficulties of their fellow-citizens in any part of the country, and the legal bureaus enable these persons to obtain, under the supervision of their government, the fullest measure of rights due to them by treaty or municipal law.³ The principle of such legal protection is followed by consulates of other nations in this and other countries, but the system apparently does not com-

¹ Tchernoff, 363 *et seq.*; Moore's Dig. V, § 719. See also Testa, Luigi, *Le voci del servizio diplomatico-consolare italiano e straniero*, 3rd ed., Rome, 1912. 735 p.

² *Supra*, § 166.

³ See the long editorial by C. C. Hyde in 5 A. J. I. L. (1911), 1055-1058.

pare in efficiency with the Italian. Its adoption by Italy has resulted in much more certainty that Italian subjects will not be the victims of injustice, private and public.

Nations subject to a large emigration, like Italy, sometimes provide various agencies, under the supervision of the consul or other person, for the care of their emigrant nationals in the principal foreign ports of immigration. Their main purpose is to prevent the immigrants from being victimized by designing imposters and pseudo-employers.¹

The exercise of consular jurisdiction over national merchant vessels and in countries in which his countrymen enjoy extraterritorial privileges² may be considered incidental to the consul's protective functions.

One of the consul's most usual duties is to address the local authorities on behalf of his fellow-citizens accused of crime or imprisoned, to support these persons in their right to due process of law, to secure all necessary information concerning their welfare, and to visit them, if proper. Being often nearest to the scene of action, the protective function in first instance is frequently exercised by the consul rather than by the diplomatic representative. Only if prevented from fulfilling his duties of protection, in cases where communication with the central government is required, need he address the diplomatic representative accredited to the country, although, as a matter of fact, in every case of more than trifling importance the consular officer either directly informs the legation of the facts or forwards to the legation a copy of dispatches sent to the Department of State.

The printed instructions to diplomatic agents contain the following provision:

"In countries with which the United States have treaty stipulations providing for assistance from the local authorities, consular officers are instructed that it is undesirable to invoke such interposition unless it is necessary to do so. In cases of arrest and imprisonment, they will see, if possible, that both the place of confinement and the treatment of the prisoners are such as would be regarded in the United States as

¹ Tchernoff, 358. Protection of Italian immigrants, For. Rel., 1894, 367-369. Abolition of Italian bureaus at Ellis Island, For Rel., 1898, 406-409. (The order was suspended on the protest of the Italian ambassador.)

² Moore's Dig. II, §§ 287-289.

proper and humane. If a request for assistance is refused, the consular officer should claim all the rights conferred upon him by treaty or convention, and communicate at once with the diplomatic representative in the country, if there be one, and with the Department of State. When such requests are made in accordance with long-established usage, he should, when they are refused, make suitable representations to the proper local authority, and likewise advise the legation and the Department."¹

It has not infrequently happened that consuls in their character as guardians of the interests of their fellow-citizens in time of civil commotion have requested the Department of State directly or through the legation to send a warship to the scene of trouble.

Treaties sometimes provide that in the absence of a diplomatic agent consuls may address the central government of the country in which the consulate is located.

Consuls as commercial representatives of their respective countries are instructed to foster the commercial interests of their fellow-citizens, and in commercial matters they are constituted sources of information.

§ 185. Treaties.

Possibly the most customary instrument for defining the rights of citizens abroad and assuring protection for their interests is a treaty between the respective countries. Such treaties are usually confined to the definition of commercial rights, but often assume a wider range. Municipal legislation, by which rights are extended to aliens upon a basis of reciprocity, is also a customary means for obtaining the grant of reciprocal rights to citizens abroad. Finally, international conventions between several states having in view an enhancement of the rights or an amelioration of the condition of aliens, may well be considered a mode of protection. Thus, the Geneva and some of the Hague conventions, the international treaties dealing with the condition of laborers, workmen's compensation, poor relief, the protection of women and children against overwork and against the white-slave traffic, and similar conventions may be regarded as coöperative measures for the mutual protection of citizens abroad.

¹ Printed Personal Instructions to Diplomatic Agents, 1885, § 150, p. 32, reprinted in Moore's Dig. V, 101.

§ 186. Methods of Redress of Injuries.

When an injury has been inflicted upon an alien in such manner as to involve the international responsibility of the state, an international case has arisen to be settled by the means recognized as legal for the settlement of any other international difference. The modes of redress may be either amicable or non-amicable, and may range from diplomatic negotiations, the use of good offices, mediation, arbitration, suspension of diplomatic relations, a display of force, retorsion, reprisals, or armed intervention, to war in the full sense of the word.

The object to be attained by resort to these methods of providing a sanction for diplomatic protection is usually a pecuniary indemnity and a guarantee against the recurrence of the international delinquency; in other words, redress for the present and security for the future. Having become a matter for international adjustment, the person injured has no control over the measure of redress to be demanded or the means to be employed, matters entirely within the discretion and control of the government. Thus it happens that the international offense growing out of an injury to a citizen may find its solution in the annexation of territory, as occurred in China in 1897 when Germany secured Kiauchau on lease as a consequence of the assassination of some German missionaries, and as occurred in 1913 in Tripoli, ceded to Italy by Turkey as the outcome of a war begun ostensibly, if not actually, because of the non-payment of claims.

AMICABLE METHODS

§ 187. Diplomacy.

Upon an injury to an alien, in a case where international responsibility is alleged by his national government, diplomatic negotiation is the first method used to secure redress. The complaining state, through its diplomatic representative, brings the claim to the attention of the defendant government, which may interpose defenses or suggest some other method of settlement, such as mediation or arbitration. The complaining government may conduct the negotiations itself or may support the claimant in his endeavor to arrive at a direct settlement with the defendant government. It may fairly be said that the majority of international pecuniary claims arising out of private injuries are

settled by diplomatic negotiation. In this connection, it is to be noted that the methods of diplomacy are in international law as truly legal a form of procedure as any of the forms of judicial procedure known to municipal law. When negotiation fails the parties may resort to the good offices or mediation of a friendly power, or to arbitration.

188. Good Offices.

The term "good offices" in diplomacy is employed in two senses. In the first, it denotes informal representations corresponding to the French *officieux*, and means "the unofficial advocacy of interests which the agent may properly represent, but which it may not be convenient to present and discuss on a full diplomatic footing."¹ It signifies the unofficial, personal and friendly efforts of a diplomatic agent, as distinguished from the official, formal and governmental support of a diplomatic claim. The line of demarcation between unofficial good offices and official interposition is not always easy to draw, inasmuch as in either case the government may authorize or direct a diplomatic representative to extend his assistance. In both cases, the diplomatic officer proceeds through the medium of the Minister of Foreign Affairs of the country to which he is accredited. The principal differences between the two forms of diplomatic action lie in the fact that in the former case, while the government has an interest in facilitating the protection of its citizen's rights abroad, it is unwilling to make his grievance or difficulty the subject of an international complaint, with the necessary consequences attendant upon its possible rejection by the government complained against, and in the further fact that the diplomatic agent has full discretion as to the best method to pursue to assist his fellow-citizen. Good offices are employed by direction of the government, among other cases, in contractual claims,² for the facilitation or acceleration of judicial proceedings in which a citizen may be involved—respecting, however, the independence of the local authorities—and, on certain occasions, for the alleviation of the punish-

¹ Mr. Hay, Sec'y of State, to Mr. McNally, Mar. 16, 1900, Moore's Dig. VII, 3; Pradier-Fodéré, P., Cours de droit diplomatique, 2nd ed., Paris, 1899, 524-527. On modes of redress, see also Halleck (Baker's ed., 1908), I, ch. XIV.

² *Supra*, § 113.

ment of citizens convicted abroad of political offenses.¹ The unofficial assistance of a diplomatic agent is often given to a citizen abroad in the direct settlement of a claim against the local government or authorities.² In many cases, the diplomatic agent does not await the authorization of his government to employ his personal good offices in behalf of his fellow-citizen requiring assistance.³ As the desirability and expediency of extending his good offices are matters of personal discretion entirely, the citizen cannot demand his assistance, when unauthorized by the government, as a matter of right. It is always open to the citizen to request the government's interposition by communicating with the Department of State, which will determine, in its discretion, the most appropriate form of action, if any, that it may be expedient to adopt. It has already been observed that the diplomatic agent may not officially present a claim to a foreign government without express instructions from the Department.

Good offices usually involve unofficial representations consisting of requests, recommendations and other personal efforts. One of their principal characteristics may be found in the fact that if unheeded, denied or rejected by the foreign government, they are not further pressed, the matter being dropped. Only on rare occasions has the unsuccessful employment of good offices on behalf of a claimant been followed by the official pressure of his claim, and then only on newly disclosed evidence or in a case where official support would have been justified in the first instance.

§ 189. Diplomatic interposition.

Diplomatic interposition in the technical sense consists in the pressure of a claim by official representations, under the authority and in the name of the government. The term "interposition" is considered preferable to "intervention," inasmuch as the latter term has a long-established meaning of armed interference in the internal

¹ Mr. Webster, Sec'y of State, to Mr. Cushing, Aug. 27, 1842, Moore's Dig. VI, 329.

² See claim of American Baptist Church at Nichtheroy, Brazil, For. Rel., 1901, pp. 28, 29; Brown's claim against Governor of the Federal District in Mexico, For. Rel., 1902, 786-789.

³ It is not possible here to enumerate the many useful ways in which the diplomatic representative may render assistance.

affairs of another state. As soon as the government determines to support a claim officially, its presentation to the defendant government practically always, in first instance, takes the form of diplomatic interposition, consisting of a formal instruction to the diplomatic representative to present a note to the Minister of Foreign Affairs, stating the grounds of complaint and demanding redress. The claim having thus entered the sphere of international controversy, is subject to all the possible vicissitudes and consequences of an international conflict, although the purpose of the interposition is always to provide a sanction for the individual rights of a citizen.

§ 190. Mediation.

The second sense in which the term "good offices" is employed is quite analogous to mediation as an impartial adviser between two opposing parties. While good offices and mediation differ in detail, *e. g.*, in the right of the third person or mediator to offer independent suggestions for a settlement, they both involve a method of reconciling opposing contentions with a view to the adjustment of a controversy. It is less frequently resorted to in cases of claims than in the adjustment of other international differences. The Hague Conventions for the pacific settlement of international disputes adopted at the conferences of 1899 and 1907 embodied various rules concerning the tender and employment of good offices and mediation, and the institution of commissions of inquiry.¹ In a dispute between Salvador and Italy in 1887, arising out of a private claim, the mediation of the United States was requested by Salvador, and on the subsequent tender of the good offices of the American minister, upon request of both parties, the claim was satisfactorily settled.² The principal difference between mediation and arbitration, a method of adjustment more frequently employed in cases of pecuniary claims, consists in the fact that the former is an advisory function and recommends, whereas the latter is a judicial function and decides.

§ 191. Arbitration.

Aside from diplomatic negotiation, the method most frequently

¹ Scott, J. B., *The Hague peace conferences*, Baltimore, 1909, I, 256 *et seq.*

² *For. Rel.*, 1888, I, 77, 107, 120.

used to settle international pecuniary claims is arbitration. In the growth of this system of adjusting international differences, the United States has taken a prominent part. Not only single claims, but large numbers of general claims have been submitted by the United States to the determination of independent arbitral tribunals, with the result that innumerable actual and potential conflicts with other countries have been adjusted by judicial means. Instead of producing a rupture of amicable relations, these claims have contributed to the creation of a permanent system of international law. The efforts of the last twenty years have been devoted largely to stimulating a resort to and perfecting the machinery of arbitration, with the result that international conventions for general arbitration have been drafted at the Hague and the Pan-American Conferences and have been concluded between many individual states.¹

No class of differences is more susceptible of settlement by arbitration than pecuniary claims, and sentiment is growing in favor of the creation of a permanent international tribunal which shall have jurisdiction, not only of contractual claims,² but of all pecuniary claims of citizens of one country against the government of another.³ Every consideration which operates in the case of contractual claims for their removal from the sphere of diplomatic controversy into the channels of judicial adjudication is equally operative in the case of all pecuniary claims involving legal issues.

¹ See the Hague convention of 1899 for the pacific settlement of international disputes, 32 Stat. L. 1785, and its revision by the convention of 1907, 36 Stat. L. 2199. See Scott, J. B., *The Hague peace conferences*, I, ch. VI; Treaty between the U. S. and other powers of America for the arbitration of pecuniary claims (Pan-American convention of January 30, 1902), 34 Stat. L. 2845; renewed by convention signed at Rio Janeiro, Aug. 13, 1906, proclaimed by the U. S., Jan. 28, 1913. Treaty series, No. 574. The Central American states concluded a convention at Washington, Dec. 20, 1907, 2 A. J. I. L. (1908), 219 *et seq.*, by which they are committed to the arbitration of all pecuniary claims, and even give a private citizen of one of them the right to sue one of the other states among them.

² *Supra*, § 126.

³ *Supra*, p. 329, note 1. C. C. Hyde and F. C. Partridge in 1914 Report of the Lake Mohonk Conference on International Arbitration, pp. 125 and 143. See also address before American Society for Judicial Settlement of International Disputes, Dec. 4, 1913, Proceedings, 49-55; see also General Conclusions, *infra*.

By the submission of a private claim to arbitration the two countries in controversy provide a forum to determine the extent of the injuries inflicted by the one upon the other in the person of a citizen, and the legal right to and amount of reparation properly payable as indemnity. The two states substitute for the diplomatic negotiation between the protecting and the defendant state an independent tribunal to determine the justification for extending protection and the merits of the defense in a given case.¹ Hence the great authority of arbitral decisions—notwithstanding certain alleged defects of the system—as a source of international law, and the reliance placed by Foreign Offices upon arbitral awards, as precedents, in the presentation of and defense against international claims.

The powers of arbitrators are usually defined and the class of cases over which they shall exercise jurisdiction is in general terms described in the protocol or treaty under which they act.² Their jurisdiction under the protocol, however, and the question whether any particular case presented comes within the class to be arbitrated or within the terms of submission are matters to be determined by the arbitrators. This was settled in two important arbitrations between the United States and Great Britain, the question having been raised under article VII of the Jay treaty of 1794 and again with regard to the power of the Geneva tribunal to deal with indirect claims.³ When such an arbitral tribunal has been brought into existence by agreement of the parties, it is an independent court of high international jurisdiction, competent, within the limits of the powers conferred upon it, "to bring under judgment the decisions of the local courts of both nations, and beyond the competence of either government to interfere with, direct, or obstruct its deliberations."⁴

¹ See *Rudloff (U. S.) v. Venezuela*, Feb. 17, 1903, *Ralston*, 182, 185, citing opinion of Sec'y of State Evarts quoted in *Moore's Arb.* 2599.

² *Moore's Dig.* VII, § 1072; *Ralston*, *International arbitral law*, Boston, 1910, pp. 19-21; *Tchernoff*, *op. cit.*, 375 *et seq.*

³ *Moore's Dig.* VII, § 1073; *Ralston*, *op. cit.*, 21-24.

⁴ Mr. Evarts, Sec'y of State, to the Spanish minister, Mar. 4, 1880, quoted in *Moore's Arb.* 2599 and cited with approval in *Rudloff (U. S.) v. Venezuela*, Feb. 17, 1903, *Ralston*, 185.

NON-AMICABLE METHODS

The non-amicable methods of redress include a suspension of diplomatic relations, retorsion, a display of force, the actual use of force, reprisals and war.

§ 192. Withdrawal of Diplomatic Representative.

On several occasions, the unsatisfactory termination of diplomatic negotiations for the settlement of international claims has led to the suspension of diplomatic relations between the countries involved.¹ In 1826 the American chargé demanded his passports from Brazil because of the alleged unwarranted capture of certain American vessels, diplomatic relations being subsequently resumed upon the payment of adequate indemnities. The failure of the American minister in Mexico to secure redress for various arbitrary seizures of property and ill-treatment of American citizens led, in 1858, to a suspension of diplomatic relations with that government. Italy temporarily withdrew its Ambassador to the United States because of the unwillingness of the United States, early in the negotiations, to acknowledge any liability for the deaths of Italian subjects in the New Orleans riot of 1891. The Department of State has on several occasions threatened to withdraw the American legation unless the foreign country in question settled or agreed to settle the claims of American citizens. Amicable relations between France and Venezuela, interrupted by the withdrawal of the French minister in 1906, because of Venezuela's refusal to pay certain claims, were restored in 1913 by the conclusion of a treaty submitting the claims to arbitration.²

§ 193. Retorsion.

Retorsion signifies retaliation in kind.³ This method of redress has but rarely been used for the non-payment of pecuniary claims.

¹ Moore's Dig. VII, § 1089.

² 13 R. G. D. I. P. (1906), 548; Protocol signed Feb. 11, 1913, 20 R. G. D. I. P. (1913), 506.

³ Moore's Dig. VII, § 1090; Halleck (Baker's ed., 1908), I, 503; Rapisardi-Mirabella in 16 R. D. I. (n. s.), 1914, pp. 223-244 (first installment); see bibliography, pp. 240-241.

The stoppage by the King of Prussia in 1753 of the interest due to British subjects on the Silesian loan, until he obtained indemnities for the unjust capture of certain Prussian vessels and their condemnation by British prize courts may be considered a form of retorsion. Upon the refusal of China in 1855 to pay a claim for personal injuries to an American citizen, the American Minister was instructed "to resort to the measure of withholding duties" to the amount of the claim.¹

Retorsion is more often used in cases where a country has placed the citizens or interests of another country under a general disability, *e. g.*, the exclusion from its ports of the vessels of a certain nation, the exclusion of products of a certain country by differential import duties or the enactment of discriminatory laws against the citizens of one particular country as compared with aliens generally. The state affected may retaliate by the enactment of similar measures. Recent tariff acts of the United States, prior to the Act of 1913, have given the President power to prescribe a differential duty against the products of a country discriminating against American products, and discriminations against American vessels in foreign ports were to be met by retaliatory measures.

§ 194. Display of Force.

The display of force and the threat to use it if reparation for an international offense is not promptly made, have frequently proved an effective means of obtaining redress in the form of an indemnity or a guarantee of security. This display of force usually takes the form of a national war-ship appearing before the port of the foreign country alleged to be in default. The moral influence exerted by the presence of a war-vessel is great, and has served not only to secure demanded reparation in given cases, but in quarters of the world subject to frequent domestic disorder has served to prevent an abuse of aliens' rights, particularly of the nationals of the country to which the vessel belongs. War-vessels have therefore on occasion been stationed for extended periods of time in the waters of the Mediterranean, around Turkey, and in the waters near Haiti and the Dominican Republic.

¹ Mr. Marcy, Sec'y of State, to Mr. Parker, Oct. 5, 1855, Moore's Dig. VII, 106.

At a time when revolutions were more frequent in Latin-America than they now are, it was not unusual to have numbers of foreign war-ships in certain harbors for the protection of aliens. The use of war-ships for such a purpose of police, perhaps the most defensible use of armed vessels, was recently illustrated in the harbor of Vera Cruz, Mexico.

Practically all the great powers have at different times resorted to a display of force to give moral support to a request for the protection of nationals in foreign countries or for the redress of injuries inflicted upon nationals. Joint action has often been taken by various powers for this purpose, *e. g.*, in China, in Buenos Aires, in Mexico and in Venezuela.¹ The United States resorted to the display of force in Japan in 1852, in Turkey on several occasions,² and within recent years in Haiti, the Dominican Republic and Mexico. In 1902, a French war-ship threatened to fire upon a town in Venezuela, unless certain French merchants, arrested for the non-payment of customs dues previously paid to revolutionists, were released.³ In 1897, the threatened bombardment of Port-au-Prince by German war-ships effected the release of a Mr. Lüders, a German subject, alleged to have been arbitrarily imprisoned by the Haitian authorities.⁴ In May 1914, the appearance of a British war-ship in the harbor of Port-au-Prince successfully supported a demand of Great Britain for the prompt settlement of the British portion of the Peters claim, decided in favor of Germany and Great Britain by an arbitral tribunal in Haiti.

There seems little doubt that the great powers in their ready resort to ultimatums and threats of the use of force to exact the payment of pecuniary claims, particularly in Latin-America, have often abused their rights and have inflicted gross injustice upon weak states.⁵

In response to an inquiry of the Turkish minister at Washington

¹ See Instruction of Lord J. Russell to Sir C. Wyke, Mar. 30, 1861 (Mexico), 52 St. Pap. 239.

² Moore's Dig. VII, §§ 1091, 1093.

³ Suchet case, 9 R. G. D. I. P. (1902), 628. The threat achieved its object.

⁴ 23 Law Mag. and Rev. (1897), 129-131; 5 R. G. D. I. P. (1898), 103; Pradier-Fodéré, Cours de droit diplomatique, 2nd ed., Paris, 1899, pp. 528-531, note. See also Ménos, Solon, L'affaire Lüders, Paris, 1898.

⁵ Pradier-Fodéré, I, § 402.

asking an explanation of the sending of an American war-vessel to Turkish waters, Secretary Olney stated that the visit of the vessel was "in pursuance of a long-established usage of this government to send its vessels, in its discretion, to the ports of any country which may for the time being suffer perturbation of public order and where its countrymen are known to possess interests. This course is very general with all other governments, and the circumstance that a transient occasion for such visits may exist does not detract from their essentially friendly character."¹

It may be said that the United States urges upon consuls and diplomatic officers the use of caution and discretion in summoning the assistance of national war-vessels, in time of disorder, for the protection of citizens.²

§ 195. Use of Armed Force.

The army or navy has frequently been used for the protection of citizens or their property in foreign countries in cases of emergency where the local government has failed, through inability or unwillingness, to afford adequate protection to the persons or property of the foreigners in question. This action has by some writers been denominated as intervention and has given rise to much confusion, due to a failure to distinguish between political intervention and non-political intervention or interposition. The landing of armed forces for the protection of citizens has practically always been free from any attempt to interfere in the internal political affairs or administration of the country entered, and when confined to the purpose of assuring the safety of citizens abroad, or exacting redress for a delinquent failure to afford local protection, the action must be considered, not as a case of intervention, but as non-belligerent interposition.³ This form of

¹ Mr. Olney, Sec'y of State, to Mavroyem Bey, Oct. 15, 1895, *For. Rel.*, 1895, II, 1324.

² Mr. Bayard, Sec'y of State, to Mr. Neill, Nov. 16, 1887, *Moore's Dig.* VII, 109.

³ The ablest discussion of the distinction between political and non-political intervention, and the true nature of interposition, with quotations from authorities and a compilation of illustrative cases is to be found in a Memorandum of J. Reuben Clark, Jr., Solicitor for the Department of State on the "Right to protect citizens in foreign countries by landing forces," Washington, August, 1912. Revised edition. 70 folio p.

protection has frequently been exercised by strong countries whose citizens are found in weak states where governmental control is at times inadequate for the preservation of order, and for the fulfillment of their international duty of protection. The United States has on many occasions, either alone or in conjunction with other powers, used its military forces for the purpose of occupying temporarily parts of foreign countries to secure adequate protection for the lives and property of American citizens. While such action has generally been necessary under the circumstances, and while it cannot be considered political intervention, it is, nevertheless, an impeachment of the effective sovereignty of the country occupied.¹

Among the various purposes for which troops and marines have been landed, are the following: ² (1) for the simple protection of American citizens in disturbed localities, the activity of the troops being in the nature of police duty; ³ (2) for the punishment of natives for the murder or injury of American citizens in semi-civilized or backward countries; ⁴ (3) for the suppression of local riots, and the restoration and preservation of order; ⁵ (4) for the collection of indemnities, either with or without the delivery of a previous ultimatum; ⁶ (5) for the seizure of custom-houses, as security for the payment of claims; ⁷ and

¹ See address of Mr. Root, printed in 4 A. J. I. L. (1910), 520, 521.

² A brief statement of most of the occasions on which American forces have been landed in foreign countries for the protection of American interests will be found in the Appendix to the Solicitor's Memorandum, *op. cit.*, 47 *et seq.* These occasions are classified in some detail at p. 31 *et seq.* See also Moore's Dig. VII, §§ 1092 and 1093, and Robin, R., *Des occupations militaires en dehors des occupations de guerre*, Paris, 1913, 824 p.

³ Memorandum, pp. 31 and 33 and citations to Appendix.

⁴ Memorandum, pp. 31 and 32 and citations to Appendix. Such punitive expeditions were undertaken at various times, among other places, in the Fiji Islands, Samoa, Formosa, China, Korea, and the Falkland Islands.

⁵ In Hawaii, 1874; in Egypt, 1882; in Mexico, 1876; Appendix to Memorandum, 60, 61; Organization of police by France and Spain in Morocco, 1907, *For. Rel.*, 1907, 899.

⁶ Island of Johanna, 1851; Nicaragua, 1854; Japan, 1864; Haiti, 1888 (Case of the *Haitian Republic*, *For. Rel.*, 1889, 491 *et seq.*, 503). Occupation by French marines in 1901 of part of Turkish island of Mitylene, a measure to obtain payment of claims of Lorando and Tubini. See Moncharville in 9 R. G. D. I. P. (1902), 677. Memorandum 32, 33, and citations to Appendix.

⁷ Action by France in Dominican Rep. and various powers in Venezuela. U. S.

for purposes such as the maintenance of a stable government, the destruction of pirates infesting certain areas, and other objects.

At times the punitive operations undertaken for the protection of nationals and their interests have bordered close upon belligerent action in the full sense and would have been so considered had they been directed against stronger states. This is so particularly in the case of bombardments, which on occasion have been directed against coast towns by British and American naval forces as a punishment for offenses against nationals or for the failure to make reparation.¹ It is hardly less so in the case of pacific blockade, an anomalous action in the nature of reprisal whose principal justification lies in the fact that it has often successfully achieved its object in a measurably short time, without precipitating war between the countries in controversy or third states whose interests are unavoidably, in some degree, deleteriously affected.

The occasions on which troops have been landed have varied, although it has always been under circumstances where the protective faculties of the local government have been so weakened that the security of aliens, particularly nationals of the interfering state, seemed so precarious that some measure of self-help was deemed necessary. This has been the case particularly in time of revolution and civil war, when the belligerent activities of the factions seeking control of the government deprived aliens of all guaranty of safety for their persons or property.²

The landing of foreign troops has not always been against the will of the local government, but on the contrary, has sometimes been carried out in response to an express invitation. The activities of the intervening troops, belonging to one nation or to several acting jointly, have assumed various forms; sometimes they have remained absolutely neutral between the contending factions, confining themselves

seizure of custom-house and occupation of Vera Cruz in 1914 was a reprisal ostensibly for insult to U. S. flag at Tampico.

¹ *E. g.*, Bombardment of Greytown by the U. S. S. *Cyane*, 1854, Moore's Dig. VII, 112-116; Bombardment of Omoa, Honduras, by British S. S. *Niobe*, 1873, 67 St. Pap. 955 *et seq.*

² See the many occasions enumerated in Memorandum, pp. 32 and 33 and Appendix.

to preventing any aggressions or attacks upon legations, consulates, foreigners or non-combatants generally; sometimes they have supported one faction against another or the constituted government against insurgents; sometimes they have insisted upon the maintenance of a neutral zone in which no fighting was to be permitted, as in the Dominican Republic in 1904 and 1914 and in Honduras in 1911; sometimes they have prevented the bombardment of certain towns or the blockade of certain ports in which foreign interests have been considerable.

The interference of the United States in these matters has been frequent in Latin-America. The hegemony of the United States on this continent and the force of the Monroe Doctrine have served to induce this government to assume, in greater degree than any other foreign government, a vague measure of primacy in the maintenance of order in the disturbed areas of Latin-America. It is not true, however, as has often been asserted, that the Monroe Doctrine throws upon the United States responsibility for the safety of foreigners in the countries to the south. The seizure of custom-houses or the temporary occupation of ports by European powers, when undertaken for the sole purpose of protecting their subjects or obtaining redress for injuries, cannot be regarded as an impeachment of the Monroe Doctrine. Moreover, while the United States was not formally a party to the Washington Conventions of 1907 between the countries of Central-America, this government, nevertheless, regards itself as in a measure responsible for their execution, and on this ground has justified its intervention in revolutions and disagreements in and between those countries designed to maintain peace. The existence of the Platt amendment in the Cuban treaty and its probable early extension to Nicaragua, and the financial control in the Dominican Republic arising out of the treaty of 1907, throws upon the United States a certain measure of guardianship in the maintenance in those countries of a responsible government capable of meeting its obligations and protecting foreigners.

Foreign military forces have on occasion been landed in time of actual war between two countries to protect legations or consulates.¹

¹ U. S. forces landed in Korea, in 1894 (Appendix to Memorandum, 63) and in Honduras in 1907 (Appendix, 66).

While the landing of troops in the cases above mentioned has been purely protective, they have not always been able to avoid belligerent operations to effect their purpose. One of the most notable of these interventions was the joint action of the powers in China in 1900 at the time of the Boxer uprising, and the landing of American troops in Nicaragua in 1910, which resulted in the loss of a few American lives.¹ While these operations have in origin practically always had the character of non-political intervention, they have at times resulted in an actual interference in the internal affairs of another country, by accident or unavoidable consequence, however, rather than principal design.

The question has occasionally been raised whether the use of the armed forces of the United States for the protection of American citizens abroad requires Congressional legislation. The landing of forces in foreign countries for the purpose of protecting American citizens is not normally an act of war, or a declaration of war, although it might possibly lead to war. Inasmuch as the Constitution vests in Congress authority "to declare war," and does not empower Congress to direct the President to perform his constitutional duties of protecting American citizens on foreign soil, it is believed that the Executive has unlimited authority to use the armed forces of the United States for protective purposes abroad in any manner and on any occasion he considers expedient. It is true that President Buchanan took a contrary view of his duties, and that Congress has on various occasions, by Act and Joint Resolution,² directed or authorized the President to employ the military forces of the United States in the protection of the interests of American citizens abroad; yet in view of the above, it seems that such authorization is entirely unnecessary, if not without constitutional warrant.³ Moreover, the commanders of the public vessels of the United States in foreign waters have on many occasions exercised a wide discretion in protecting American

¹ Memorandum, 33, and citations to Appendix. See particularly, p. 67.

² *Supra*, p. 363. See, *e. g.*, Act of March 3, 1819, 3 Stat. L. 510 (protecting merchant vessels from piratical aggressions); Resolution of June 2, 1858 (*Water Witch* and other claims against Paraguay); J. Res., June 19, 1890 (Venezuelan Steam Transportation Co. claim *v.* Venezuela); J. Res. of Mar. 2, 1895 (*Mora* claim *v.* Spain).

³ See the able discussion in Memorandum of the Solicitor, *op. cit.*, 34-43.

interests by force of arms, and have in emergencies acted without special authority even of the Executive, although responsible to him for their action.¹

§ 193. Reprisals.

Reprisals are retaliatory measures of self-help taken by states, as a last resort, to obtain redress for an injury.² Such measures may assume a variety of forms, and consist of some seizure of the property or some equivalent injury to the interests of the offending state. Their dangerous proximity to war measures is apparent. In former times, special letters of reprisal were issued to particular individuals who had sustained injury at the hands of a foreign government or its subjects, authorizing them to exact redress on their own account. The United States has never granted authority for special reprisals, and the practice has universally fallen into desuetude. General reprisals by the nation are not infrequent as a mode of redress. One of the best examples of such a measure was the recommendation of President Jackson proposing to exclude French vessels and products from the United States until the French chambers appropriated the indemnity payable under the treaty of 1831.³ They have been resorted to frequently in recent years.⁴

Among other measures of reprisal adopted for the non-payment of pecuniary claims, have been the following: the seizure of vessels of the offending state;⁵ the seizure of custom-houses and the temporary

¹ Moore's Dig. VII, § 1093.

² See the able discussion in Lawrence's Wheaton, 2nd ed., 1863, 506-510; Vattel, liv. II, ch. 18, § 342; Moore's Dig. VII, §§ 1095, 1096.

³ Moore's Dig. VII, 123-130.

⁴ Moore's Dig. VII, § 1096. The recent abrogation by the U. S. of the treaty of 1832 with Russia because of Russia's unwillingness to admit American citizens of Jewish faith, may well be considered a measure of reprisal, under the circumstances.

⁵ Great Britain seized vessels of Naples in 1840, for alleged violation of treaty in the grant of a sulphur monopoly in 1816, Lawrence's Wheaton, 509; British reprisals against Spain, 9 St. Pap. 897; Great Britain in 1861 seized five vessels of Brazil in Rio Janeiro as reprisal for non-payment of *Prince of Wales* claim, Hogan, Pacific blockade, 117; Blockading powers, Germany, Great Britain and Italy seized Venezuelan vessels in 1903, For. Rel., 1903, 417; British commander instructed to seize Nicaraguan vessels in 1895, For. Rel., 1895, II, 1025-1034.

occupation of towns;¹ the bombardment of coast towns;² the blockade of ports and the interruption of commerce;³ the despatch of punitive expeditions,⁴ the declaration of embargoes⁵ and the passage of non-intercourse acts,⁶ and other forcible measures having in view

¹ *E. g.*, British occupation of Corinto, 1895, For. Rel., 1895, II, 1025, 1032. French seizure of the fort of San Juan de Ulloa, Mexico, 1838. This actually resulted in a declaration of war by Mexico, settled by treaty of peace of March 9, 1839. Alvarez in 3 A. J. I. L. (1909), 298. French seizure of custom-house at Mitylene, 1901, For. Rel., 1901, 529 and 9 R. G. D. I. P., 677. This has been done in Latin-America on several occasions by various powers.

² British bombardment of Omoa, 1873, 67 St. Pap. 955; U. S. bombardment of Greytown, 1854, Moore's Dig. VII, 112-116.

³ The anomalous remedy known as pacific blockade has been used for the redress of many wrongs besides those arising out of the non-payment of claims. The nature of this extraordinary remedy is best discussed in Hogan, Albert E., *Pacific blockade*, Oxford, 1908; Ducrocq, *Représailles en temps de paix*, Paris, 1901; and Staudacher, H., *Die Friedensblockade*, Leipzig, 1909. Illustrative cases may be found in Hogan, 73 *et seq.*; Moore's Dig. VII, § 1097, and Tchernoff, *op. cit.*, 238-244. It has on several occasions been used as a measure of reprisal for the non-payment of claims, notably by France against Portugal in 1831 (Hogan, 77; Ducrocq, 100; Tchernoff, 239; Moore's Dig. VII, 136); by France against Mexico in 1838 (Hogan, 85; Ducrocq, 111; Moore's Dig. VII, 136); by Great Britain against Greece in 1850 in the *Pacifico*, *Finlay* and *Fantome* cases (Hogan, 105; Calvo, III, § 1841; 39 St. Pap. 480; Lawrence's Wheaton, 2nd ed., 509; Moore's Dig. VII, 132); by Great Britain against Brazil in 1862 in the *Prince of Wales* and *Forte* cases (Hogan, 117; 73 St. Pap. 81 *et seq.*; Moore's Dig. VII, 137); and by Great Britain, Germany and Italy against Venezuela, 1902-1903 (For. Rel., 1903, 417-439; Hogan, 149; Zeballos in 1 Bull. argentin de dr. int. privé, 145-177). While pacific blockade is a measure of constraint much milder than war, it merges easily into war, if resistance is long-continued; see, *e. g.*, the French blockade of Formosa, 1884 (Hogan, 122; Ducrocq, 129). The United States has always insisted that pacific blockade must not affect the rights of states not parties to the controversy (For. Rel., 1903, 420 *et seq.*; Moore's Dig. VII, 141); but it is hardly possible to avoid interfering with the commerce of third states, even if vessels of the blockaded country only are seized.

⁴ French expedition against Portugal, 1831, 18 St. Pap. 395, 397; British expedition against Abyssinia, 1867, Bonfils, § 440; Agreement between Great Britain, France and Spain, 1861, for taking of forcible measures against Mexico, Moore's Dig. VI, § 956; Lawrence's Wheaton, 509.

⁵ The United States in 1807 passed an embargo act prohibiting the departure of vessels from U. S. ports as a measure of reprisal for Napoleon's Berlin decree of 1806 and the British orders in council. Other embargo acts were passed in the years between 1807 and 1814. Moore's Dig. VII, § 1008.

⁶ Non-intercourse Act of 1798 suspended commercial intercourse between U. S. and France and her dependencies. By the Act of 1809, it was made unlawful to import French products. Moore's Dig. VII, § 1099.

retaliation and the exaction of redress.¹ An example of a negative reprisal may be found in the instruction to the British minister in Mexico in 1858, making the recognition of the Constitutional Government contingent upon acknowledgment by that Government of liability for certain claims of British subjects.²

It will have been observed that in most of these cases the forcible action undertaken was in fact the establishment of a state of limited war, and in some cases war actually resulted.³

§ 197. War.

Only in rare instances has a state actually undertaken war in the full sense—in its physical manifestations merely general reprisals—as a mode of redress for the failure to extend local protection to its nationals or for the non-payment of claims. The means of constraint enumerated above have at times assumed the form of hostile belligerent action, but the protecting state has usually endeavored to avoid a construction of its acts which might entail all the legal consequences of war, particularly in its relations with third states. Nevertheless Great Britain's armed expedition against Abyssinia in 1867 on account of the imprisonment and detention of several British subjects has been considered a war measure,⁴ and Italy expressly alleged that the principal reason for its declaration of war against Turkey in 1912 was the non-payment of Italian pecuniary claims. It may be remembered that one of the causes of the war of 1812 between the United States and Great Britain was Great Britain's continued interference with American vessels and the removal of American seamen alleged to be British subjects. The claims of citizens of the United States against Mexico for "grievous wrongs perpetrated by Mexico" were recited by President Polk in his special message of May 11, 1846 as one of the causes which required the adoption of war measures.⁵ Not a few inter-

¹ *E. g.*, the use of naval forces to support threats and ultimatums, *supra*, p. 449 and Memorandum of Solicitor, 31-33.

² Lord J. Russell to Sir C. Wyke, Mar. 30, 1861, 62 St. Pap. 237.

³ French blockade of Mexican ports in 1838, Hogan, 85, Moore's Dig. VII, 136; French blockade of Formosa, 1884, Hogan, 122.

⁴ Bonfils, § 440; Annual Register, 1868.

⁵ S. Doc. 337, 29th Cong., 1st sess., 5.

national conflicts have had their origin in public wrongs to the state arising, however, out of persistent violations of the commercial or other interests of nationals.

This cursory survey of the means of assuring protection to citizens abroad and of exacting redress for a violation of their rights will have indicated the variety of agencies and methods authorized and recognized by international law for the enforcement of the rights of aliens. If these measures of constraint are usually applied by strong against weak states, it is largely because it is in the latter that the treatment of aliens frequently falls below the standard prescribed by international law and civilized custom and because in these states local protective agencies, both administrative and judicial, are often deemed unsatisfactory as guarantees of adequate remedies for defects in the measures adopted for the security of life and property.

PART III

THE OBJECT OF PROTECTION—THE PERSON AND PROPERTY OF CITIZENS

CHAPTER I

CITIZENSHIP THE PRIMARY TITLE TO PROTECTION

§ 198. American Citizenship.

It is now proper to enter upon a study of that branch of the present subject which relates to the legal status and qualifications necessary to the individual to entitle him to protection. While citizenship, as has already been observed, is the primary condition of or title to protection, it will be noted that this principle has numerous modalities and variations. It will be necessary to examine the various classes of persons to whom protection is extended by the government, and the effect upon their right to protection of various legal relations into which they may enter.

Citizenship in constitutional law and citizenship or nationality in international law are not necessarily coextensive terms. Having already discussed the different senses in which the term "citizen" is used and the classes of persons to whom it is applied in the United States,¹ attention may now be confined to the international phases of citizenship in its relation to diplomatic protection.²

The principal statutory provisions relating to citizenship in the United States are contained in title XXV, §§ 1992 to 2001, of the

¹ *Supra*, § 12. See also H. Doc. 326, 59th Cong., 2nd sess., p. 43 *et seq.*

² No attempt will be made to undertake an exhaustive study of citizenship in the municipal law of the United States. That phase of the subject is discussed in Morse, A. P., A treatise on citizenship, Boston, 1881; Van Dyne, F., Citizenship of the United States, Rochester, 1904; Webster, Prentiss, A treatise on the law of citizenship in the United States, Albany, 1891; Wise, J. S., A treatise on American citizenship, Northport, L. I., 1906 and in H. Doc. 326, 59th Cong., 2nd sess., Washington, 1906.

Revised Statutes, and in the Act of March 2, 1907,¹ to which we shall have frequent occasion to recur in discussing the various classes of persons entitled to protection.

Broadly speaking, there are three categories of citizens of the United States—those who have acquired citizenship either (1) by birth, or (2) by naturalization, or (3) by annexation of territory.

Prior to the Fourteenth Amendment, the Constitution of the United States did not declare who were and who were not citizens, nor did it define the constituent elements of citizenship.² The Fourteenth Amendment, while intended primarily for the negro race, has in fact conferred citizenship upon persons of all other races, "born or naturalized in the United States and subject to the jurisdiction thereof."³ Citizenship extends also to the foreign-born children of American citizens, with the limitation that the rights of citizenship shall not descend to children whose fathers have never resided in the United States.⁴

Naturalization is another method of acquiring citizenship, and in international relations gives rise to many difficult problems. The power to naturalize foreign subjects was expressly granted by the states to the federal government, and as early as 1790 Congress made statutory provision for naturalization. The principal legislation on the subject is to be found in title XXX (§§ 2165-2174), and §§ 5395 and 5424-5429 of the Revised Statutes, and in the Act of June 29, 1906, as supplemented by the Regulations of the Department of Commerce (34 Stat. L. 596).⁵ The internationally important phases of naturaliza-

¹ 34 Stat. L. 1228.

² 10 Op. Atty. Gen. 382.

³ Fed. Stat. Annotated, I, 785; *In re Rodriguez*, 81 Fed. Rep. 337, 353; *U. S. v. Wong Kim Ark* (1898), 169 U. S. 649 (person born in U. S. of Chinese parents). Strict limitations, however, prevail as to the persons capable of naturalization. These persons embrace only "white persons" and persons of African descent. 2 Stat. L. 153, R. S., § 2169; Moore's Dig. III, § 383; Van Dyne, *Naturalization*, Washington, 1907, 40-53.

⁴ R. S., § 1993. See *infra*, § 270; Act of Mar. 2, 1907, §§ 5 and 6, 34 Stat. L. 1229; and Regulations of the Dept. of State, Apr. 19, 1907, For. Rel., 1907, p. 9.

⁵ The Act of June 29, 1906 repealed §§ 2165, 2167, 2168 and 2173 of the Revised Statutes. We cannot here undertake a study of naturalization in American municipal law. For this purpose, reference may be made to the Fed. Stat. Annotated, V, p. 200 *et seq.*, and to the Act of June 29, 1906; to "Naturalization laws and regulations," published at frequent intervals by the Dept. of Labor, Bureau of Naturalization

tion and particularly its relation to diplomatic protection abroad, will be discussed in the course of the present Part of this treatise.

Besides the customary method of naturalization involving a declaration of intention, a petition for naturalization, a fixed period (usually five years) of residence, a compliance with certain qualifications as to age, education, and moral character, the renunciation of any order of nobility or hereditary title and the oath of allegiance and renunciation of prior allegiance, the statutes of the United States provide for other methods of acquiring citizenship. Thus, children who are minors at the time of their parent's naturalization become citizens if dwelling in the United States.¹ Alien women who marry American citizens thereby acquire American citizenship.² An honorably discharged soldier, of age, may be admitted to citizenship upon his petition, without any declaration of intention, on proving one year's prior residence in the United States.³ An honorably discharged sailor in the Navy, of age, may be admitted to citizenship without a declaration of intention, after a consecutive service of five years.⁴ The widow and minor children of an alien who dies after declaring his intention but before becoming naturalized may, by complying with certain provisions of the Act of June 29, 1906, become naturalized without making a declaration of intention.⁵ Finally, Congress may by private Act admit an alien to citizenship.⁶

(latest edition dated Dec. 19, 1914); to Van Dyne, F., A treatise on the law of naturalization of the U. S., Washington, 1907; to Webster, P., Law of naturalization in the U. S. and of other countries, Boston, 1895; and to H. Doc. 326, 59th Cong., 2nd sess., 80 *et seq.* For early history of naturalization, see *ibid.* 8 *et seq.*; Moore's Dig. III, 297 *et seq.*; and to Shear, J. C., Syllabus-digest of decisions under the law of naturalization, Sept. 1906 to Aug., 1913, Collingswood, 1913.

¹ R. S., § 2172. As to what is "dwelling in the U. S.," see *In re Palagnano*, 38 Fed. 580, *In re Gayde*, 113 Fed. 588, and Van Dyne, Naturalization, 82, 197 *et seq.* But see *In re Di Simone*, 108 Fed. 942, reversed by *In re Gayde*.

² R. S., § 1994. Section 4 of the Act of March 2, 1907; Van Dyne, Naturalization, 227 *et seq.* *Infra*, § 264.

³ R. S., § 2166.

⁴ Act of July 26, 1894, 28 Stat. L. 124.

⁵ Act of June 29, 1906, § 4, par. 6. Section 2167, R. S., which permitted minor residents under certain circumstances to dispense with the declaration of intention has been repealed by the Act of 1906, owing to the many frauds perpetrated under the so-called "minor's clause."

⁶ Act of Feb. 23, 1915, admitting to citizenship George Edward Lerrigo; see *Hear-*

It has been held that imperfect or defective naturalization cannot confer rights to American citizenship or diplomatic protection.¹ The limited passport granted by the Secretary of State in his discretion to those who have declared their intention to become citizens and who have resided three years in the United States may be considered a slight modification of this principle.²

§ 199. Naturalized Citizens Abroad.

Although prior to 1868 naturalized citizens of the United States had on numerous occasions secured the active diplomatic interposition of the government in their behalf equally with native citizens, it was not until the Act of July 27, 1868 (15 Stat. L. 224) that Congress gave formal legislative expression to the obligation of the United States to extend the same protection abroad to naturalized as to native citizens.³ The immediate occasion of the law was the arrest of certain naturalized citizens by the authorities of their parent countries—which adhered to the doctrine of indefeasible allegiance—for non-performance of military service.⁴ The United States has experienced much difficulty and in some cases indeed has met with failure in extending equal protection to native and naturalized citizens, inasmuch as the views and attitude of foreign governments with regard to expatriation and the obligations of their former subjects and citizens to their native country vary greatly, as will be seen hereafter. While the United States has concluded numerous naturalization treaties defining the status of naturalized citizens of a particular national origin, on their return to their native countries, the unwillingness of many countries to conclude naturalization treaties has made im-

ings before House Committee on Immigration and Naturalization, May 7 and 21, 1914.

¹ For. Rel., 1887, 190 *et seq.*; For Rel., 1885, 849 *et seq.*; H. Doc. 326, 59th Cong., 2nd sess., 209.

² *Infra*, p. 501.

That provision of the Act, now embodied in § 2000 of the Revised Statutes reads: "All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this Government the same protection of person and property which is accorded to native-born citizens." See also Morse on Citizenship, § 134.

⁴ See a brief account of the historical and political setting of the Act in S. Doc. 326, 59th Cong., 2nd sess., pp. 10-13.

possible of complete execution the legislation of Congress looking to the equal treatment of naturalized American citizens everywhere. In fact, the frequency of cases in which naturalization in the United States was obtained merely for purposes of securing American protection while residing more or less permanently abroad led Congress in 1906 and in 1907 to differentiate between native and naturalized citizens by providing, among other things, that when any naturalized citizen shall, within five years after the issuance of his naturalization certificate, take permanent residence in his native or any other foreign state, the Department of Justice may institute proceedings to cancel his certificate,¹ and that "when any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen."² While this provision merely raises a rebuttable presumption, having effect only during the foreign residence of the naturalized citizen, it has served on many occasions to relieve the United States from the duty to protect this type of undesirable citizen. Great Britain has avoided many annoying diplomatic controversies with the countries to which her naturalized subjects originally owed allegiance and which still claim it, by providing that a naturalized and a natural-born British subject shall be entitled to the same rights and privileges, "with the qualification, that [a naturalized subject] shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof or in pursuance of a treaty to that effect,"³ which clause is printed on passports issued to naturalized subjects.

Strictly speaking, the third general category of citizens, namely, those endowed with citizenship by reason of annexation of territory, constitute a special class of naturalized citizens. Citizenship thus conferred may be called collective naturalization, and this method

¹ Act of June 29, 1906, § 15, 34 Stat. L. 601.

² Act of Mar. 2, 1907, § 2. These provisions of the acts of 1906 and 1907 will be more fully examined hereafter.

³ The Naturalization Act, 1870, § 7. This provision is omitted from the British Nationality and Status of Aliens Act, 1914.

is exemplified by the admission of new states into the Union, or by acquisition of territory by treaty, purchase or conquest.¹ This last class of American citizens has been greatly increased recently by the acquisition of Porto Rico and the Philippines. While the inhabitants of these insular possessions have been held not to be citizens in the constitutional sense of the word, they are American nationals in the international sense,² and as such entitled to the protection abroad of the United States.³

§ 200. Citizenship Usually Essential to Protection.

Citizenship is usually an essential condition of diplomatic protection. In the matter of the presentation and enforcement of international claims, no rule is more strictly observed. Thus, protocols for the arbitration of general claims usually provide for the adjudication of claims on the part of corporations, companies, or private individuals, citizens of the United States, against the other government, party to the arbitration. International commissions and the Department of State have on many occasions laid down such rules as the following:⁴ a claim must be national in origin and at the time of presentation, and continuously national in ownership;⁵ the direct beneficiaries of an award must be citizens;⁶ the claim of a foreigner against a foreign

¹ See the discussion of judicial determinations of these questions in H. Doc. 326, 59th Cong., 2nd sess., 153-159 and 72. On collective naturalization, see also Moore's Dig. III, §§ 379, 380; Van Dyne, Naturalization, 265-332.

² Our new peoples; citizens, subjects, nationals or aliens, by F. R. Coudert, Jr., 3 Columbia L. Rev. (1903), 13-32; American citizenship by D. O. McGovney, 11 Columbia L. Rev. (1911), 231-250, 326-347; Decisions cited in H. Doc. 326, 59th Cong., 2nd sess., 72-73. The same relation between the constitutional and international aspects of nationality arises in most countries possessing colonial dependencies. See Sargent, E. B., British citizenship, London, 1912, and same author in No. 31 (July, 1914), Journ. of the Soc. of Comp. Leg. 327-336.

³ Circular of May 2, 1899, For. Rel., 1900, 894; Act of Apr. 12, 1900, 31 Stat. L. 77 (for Porto Rico), Act of July 1, 1902, 32 Stat. L. 692 (for Philippines), and Act of June 14, 1902, 32 Stat. L., I, 386, amending § 4076, R. S., providing for protection and issuance of passports to the inhabitants of our insular possessions. Moore's Dig. III, 315-318, 874-878.

⁴ These rules will be more carefully examined hereafter.

⁵ *Infra*, §§ 306 *et seq.*

⁶ *I. e.*, under the general form of protocol above mentioned. See *Burthe v. Denis*, 133 U. S. 514, reversing *Succession of de Circé*, 41 La. Ann. 506.

government cannot be nationalized by assignment to an American citizen, or by the naturalization of its owner.¹ Numerous questions of citizenship which have had to be determined by international commissions and the Department of State in connection with claims to diplomatic protection will be considered in this Part under appropriate sections.

§ 201. Occasional Protection of Foreigners.

Notwithstanding the general rule so strictly enforced by claims commissions, there have been a few cases in which foreigners have received awards from domestic commissions. Perhaps the most famous of these cases occurred under the Acts of Congress of 1874 and 1882 establishing the first and second court of commissioners of Alabama claims, for the distribution of the Geneva award paid by Great Britain to the United States. The Act of June 23, 1874 provided (§ 12) that no claims should be allowed "arising in favor of any person not entitled at the time of his loss to the protection of the United States in the premises." Under this provision, unnaturalized foreigners, except British subjects, who were excluded on special grounds,² were permitted to come within the benefits of the Act. For example, aliens shipping goods on American vessels during the rebellion, or employed as seamen on vessels owned and registered in the United States (except British subjects) were held to be entitled to "the protection of the United States."³ The second *Alabama* Claims court, established by the Act of June 5, 1882, held, however, that the protection of the United States extended to British subjects serving on American vessels⁴ and to the American owners of goods shipped on a British vessel.⁵ But the London Lloyds association of underwriters were held not entitled to the protection of the United States.⁶

¹ *Infra*, § 306.

² *Worth v. U. S.*, No. 91, Davis' Report, Washington, 1877, p. 35.

³ Davis' Report, 105; *Rodocanochi Sons & Co. v. U. S.*, Moore's Arb. 2359; *Morse on Citizenship*, § 178, p. 218. See the interesting case of *Schreiber and Meyer v. U. S.*, where naturalization of a German in British East India was held only qualified British naturalization and hence did not exclude claimant from the benefits of the Act. Davis' Rep. 105, Moore's Arb. 2350, Morse, § 178.

⁴ *Cassidy v. U. S.*, No. 144, Moore's Arb. 4672.

⁵ *The Pacific Mills v. U. S.*, No. 793, class 2, *ibid.* 4673.

⁶ *Bischoff et al. v. U. S.*, No. 5693, class 1, *ibid.* 4672.

Occasional exceptions to the rule that citizenship is an essential condition to diplomatic protection have been made in cases where a foreigner was in imminent danger or placed under unusual circumstances requiring diplomatic assistance. Some of these exceptional cases will be referred to briefly. It may be said, however, that in rendering assistance to the citizens or subjects of a foreign government abroad this government, generally speaking, can only instruct its diplomatic representatives to extend their personal good offices in behalf of such persons, and such assistance does not ordinarily extend to matters in connection with the presentation and collection of claims against foreign governments. When such an individual foreigner invokes the protection of an American diplomatic or consular representative, the consent of the individual's government is, if possible, first obtained by the Department of State.¹

After the war with Spain, when Spain relinquished her sovereignty over Cuba and before the Cubans acquired an independent status, the United States undertook to protect Cubans temporarily residing abroad by the use of the good offices of its representatives.² It frequently occurs that in times of civil disturbance, especially in Latin-America, the United States diplomatic and consular officers extend protection to foreigners. By the exercise of the right of asylum, protection has often been extended to natives of those countries, when political refugees, or on grounds of humanity.³ The Department of State for some years, however, has discouraged the practice of asylum, because of its easy abuse. The peculiarly close relations of the United States to Panama, Nicaragua and the Dominican Republic, and a general desire to prevent foreign governments from taking aggressive action against the countries of Central America in support of claims has often led the United States to use its good offices to adjust pecuniary demands of foreign governments upon those republics.

In the protection of missionaries in Oriental countries, the United States has avoided the example of France, Russia, Great Britain and

¹ Mr. Sherman, Sec'y of State, to Baron von Thielmann, Mar. 10, 1897 (protection of German vessel at Martinique). For. Rel., 1897, p. 183. See *infra*, § 204.

² See circular of May 2, 1899, For. Rel., 1900, 894 and its application to various special cases as set forth in Moore's Dig. III, 295, 296.

³ See Leval, *op. cit.*, §§ 15-17.

Germany of extending their protection not only to their subjects but also to the members of Christian bodies or communities of the faiths so closely identified with their national history. The United States has followed the policy of extending protection to American citizens only, or to American interests in property devoted to religious purposes.¹ Where American missionaries constitute a distinctive American community in an extraterritorial country, citizenship could, until 1914, be handed down from father to son without restriction as to those whose fathers had never resided in the United States.² This privilege did not however extend to the children of naturalized citizens beyond the second generation.³ By a circular instruction of July 27, 1914, in which the whole matter was reconsidered, it was ruled by the Department of State, reversing a position which had been maintained since 1887, that the exception, in the case of extraterritorial communities, to the application of § 1993 of the Revised Statutes, by which citizenship had been held inheritable indefinitely regardless of the residence of the father in the United States, was altogether unjustified, and that the exception should be abolished.⁴ The occupation as a missionary in Turkey or China serves to overcome the presumption of expatriation on the part of a naturalized citizen leaving the United States for a period of two or five years, respectively, within the meaning of § 2 of the Act of March 2, 1907.⁵

¹ Mr. Adee to Sister Genevieve, Sept. 10, 1895, Moore's Dig. VI, 631; Sec'y Frelinghuysen to Mr. Gifford, Dec. 19, 1884, *ibid.* 639; Sec'y Cass to Mr. Williams, Oct. 22, 1860, *ibid.* 333 and extracts quoted in Moore's Dig. VI, § 922; Hineckley, F. E., American consular jurisdiction in the Orient, Washington, 1906, p. 108 *et seq.*; H. Doc. 326, 59th Cong., 2nd sess., 207, 208 and reference to For. Rel., 1887, p. 1094; 1891, p. 765; 1892, p. 609; 1895, II, pp. 1256, 1461, cited by Hineckley, p. 110. Article 14 of the treaty of 1903 between the U. S. and China deals with the rights of American missionaries and also indicates the policy of the U. S. A useful account of the protection accorded by the U. S. to missionaries abroad is presented in an article by J. B. Scott in 6 A. J. I. L. (1912), 70-85. A Johns Hopkins doctor's dissertation, Owens, O. L., The protection of American foreign missionaries by the United States, is announced for early publication.

² Thus modifying § 1993, R. S.

³ *Infra*, § 332.

⁴ Special Instruction No. 340, July 27, 1914, with annexed opinion of Solicitor in Lilienthal's case.

⁵ Circular of Dec. 11, 1907 (Turkey), clause (d); Circular of May 13, 1908 (China), clause (e). *Infra*, p. 707.

Good offices, however, have on numerous occasions been extended to protect persons, even not American citizens, from religious persecution, especially Christians in Turkey.¹ Persecuted native teachers and native converts have occasionally received a limited protection and the treaties of Berlin (1878) and of 1903 with China stipulate that there shall be no discrimination against native converts.² On grounds of humanity, the United States has at various times expressed its disapproval of or conveyed the protests of American public opinion against the abhorrent persecution of Jews in Morocco, Russia and Roumania.³ This intercession of the United States has been characterized in its expression by that national reserve against interference in the affairs of European powers which may be considered inherent in our foreign policy. Only when the direct result of such persecution was to cause the immigration of large numbers of wretched paupers into the United States, has justification been found for a more vigorous remonstrance against the persecution.⁴

A limited protection is in certain cases extended to persons who have not yet acquired full citizenship, to which reference will be made hereafter. These include persons who have resided in the United States for three years, and have declared their intention of becoming citizens, to whom the Act of March 2, 1907 authorizes the issuance of passports valid for six months.⁵ Awards were made by the mixed claims commission with Mexico under the protocol of July 4, 1868 to a free American negro, although at the time the injury occurred, it had been judicially held that the claimant was not an American citizen.⁶

¹ Cases cited in Moore's Dig. VI, 334-335.

² *Infra*, p. 470.

³ Moore's Dig. VI, §§ 923, 925 and 926.

⁴ President Harrison in Annual Message, Dec. 9, 1891, For. Rel., 1891, xii; Mr. Hay, Sec'y of State, to Mr. Wilson, July 17, 1902, For. Rel., 1902, p. 910. See other extracts quoted in Moore's Dig. VI, §§ 925, 926.

⁵ *Infra*, p. 501. See also French protection of a person in Haiti who had not yet acquired full French nationality. 18 Clunet (1891), 115. Koszta's case may be noted in this connection. *Infra*, § 250.

⁶ Mathieu (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2461; Howard's case, *ibid.* 2462. See also Aubry's case (France) v. U. S., Jan. 15, 1880, *ibid.* 2511 (as to free negroes becoming citizens by annexation of Louisiana). The American Minister in Mexico had in 1855 issued a circular to American consuls forbidding them to extend protection to free negroes born in the U. S. Sec'y Marcy had however declared that

PROTECTION OF FOREIGNERS IN "EXTRATERRITORIAL" COUNTRIES

§ 202. Extraterritorial Protection and Jurisdiction.

In countries in which the United States exercises extraterritorial jurisdiction,¹ protection is not strictly confined to citizens of the United States. While the practice varies somewhat in different countries, *e. g.*, in Turkey,² Morocco,³ and China,⁴ it contemplates a limited protection of foreigners, *i. e.*, persons not American citizens, and in many cases of certain classes of natives. In this connection, diplomatic protection by way of good offices is clearly to be distinguished from jurisdiction, for the United States has firmly denied its consuls the right to entertain jurisdiction of foreigners, even with the consent of the foreigner and of the local government.⁵ Good offices are often extended to foreigners who have no diplomatic or consular representative in the country or conveniently near, although wherever possible the conditions accompanying delegated protection, namely, the consent of the foreigner's national government, the consul's home government and of the local government, are required.⁶ In China, however,

protection should be extended to them, providing they were free, notwithstanding the Dred Scott decision which held them not to be citizens. The U. S.-Mexican commission, until Thornton became Umpire, also made awards in favor of persons who were either only domiciled in the United States or had, in addition, declared their intention of becoming citizens. *Infra*, § 252.

¹ See *supra*, p. 433.

² Moore's Dig. II, § 288; Rey, F., *La protection diplomatique . . . dans les échelles du Levant*, Paris, 1899, p. 244 *et seq.*; Brown, Philip M., *Foreigners in Turkey*, Princeton, 1914. Turkey's attempt to abrogate the Capitulations has already been referred to, *supra*, p. 431.

³ Treaty of July 3, 1880, *Treaties in Force*, 1904, pp. 428-434, especially arts. 1, 7, 9, and 16, Moore's Dig. II, § 289; Le Bœuf, Paul, *De la protection diplomatique et consulaire des indigènes au Maroc*, Bergerac, 1905.

⁴ Hinckley, pp. 85, 88. See Hall, *Foreign powers and jurisdiction*, Oxford, 1894, pp. 136-139.

⁵ See Instructions of Secretaries Fish and Gresham reprinted in Moore's Dig. II, 597-599. In British consular courts, the consent of the foreigner sued and of his government are both prerequisites to entertaining jurisdiction. Piggott, *Exterritoriality* (1907 ed.), 183-184. As to protégés, it is very doubtful whether the statutes of the United States authorize the assertion of criminal jurisdiction over those who are not American citizens.

⁶ Hinckley, 88 and *infra*, § 204. France and Germany, however, appear to have exercised extraterritorial jurisdiction over Swiss citizens. Hinckley, 89. Under the

Russia and France extend wide protection to the subjects of non-treaty powers, a practice to which China consents, subject to the limitation that protective functions shall not assume the form of jurisdiction. The theoretically and legally correct position of China has at times been violently overturned by the aggressive attitude of certain powers.¹

§ 203. Protégé System.

This protection of foreigners extends, within its limitations, not only to subjects of the countries of the western world, but has, as its distinctive feature, the protection of certain classes of natives. These natives are generally connected in some official capacity with the consulates or legations of the United States, or, in China, they may be employees of American citizens.² The extent of protection furnished these persons, generally designated as protégés, varies somewhat in the different extraterritorial countries. In the Ottoman Empire, the protégé system—both as to foreign and native protégés—was formerly much abused. Foreigners of various nationalities and large numbers of native subjects could, by merely enrolling their names at a consulate, receive its protection.³ This so-called doctrine of assimilation, which prevailed principally in the Levant, has been gradually restricted by the Ottoman government, with the coöperation of the foreign powers, in which effort the United States and Great Britain have taken a prominent part. The protection of native protégés is now restricted to a limited number of dragomans, guards or cavasses, convention of Nov. 7, 1899 for the submission of claims growing out of the military action of American, German or British officers in Samoa, it was agreed that either country might, with the consent of the other, submit to the arbitrator similar claims of other persons (not Samoan natives) who were under its "protection." For. Rel., 1899, p. 671.

¹ The contentions in question were brought to the attention of the U. S. on a certain occasion in 1909, For. Rel., 1909, pp. 68-69. For the position of the U. S. on this matter, declining to exercise jurisdiction over the subjects of non-treaty Powers, see Aide-Mémoire to the Russian Embassy, Oct. 11, 1910, For. Rel., 1910, 838.

² For protection of Chinese employees of American citizens, see For. Rel., 1900, pp. 394-402.

³ Hinckley, 83; Hall, 137; Rey, 199 *et seq.*; Moore's Dig. II, 596; H. Doc. 326, 59th Cong., 2nd sess., 206. The protégé system does not, as such, exist in China. Koo, ch. XII and XVIII.

and servants, and their wives and minor children, so long as they are actually employed in the service of the consulate or legation. It is the policy of the United States to limit to as few as may be necessary the persons exempt from the local jurisdiction by reason of their attachment to legations and consulates as assistants, guards or servants.¹ This appears also to be the British policy.²

In China, the extent of protection to natives is usually limited by treaty. The Chinese employee of a citizen or subject of a treaty power in the Anglo-American settlement at Shanghai and in certain ports of China may not be arrested without notification to the consul nor be tried except under certain formalities.³

In Morocco, the practice of protection is regulated by the treaty between the powers and Morocco of July 3, 1880, to which treaty the United States is a party.⁴ By this convention the protected persons, or protégés, are divided into three classes: (1) Native employees of legations and consulates; (2) native factors, brokers, or agents (*semsars*) employed by foreign merchants; and (3) natives, not exceeding twelve in number, who have rendered signal services to the protecting power.

¹ Hinckley, 85; Consular Regulations, 1896, § 173. No passports are issued to persons thus protected but, when necessary, certificates, setting forth their official positions. Moore's Dig. II, § 287.

² Hall, 137. Under its former policy Great Britain is still constrained to extend protection over a considerable number of protégés. Brook, State protection of subjects abroad, Law Mag. and Rev. 1905, p. 171 (taken largely from Hall).

³ Hinckley, 85-86; Moore's Dig. II, 599; For. Rel., 1900, 394-402. Claims of Chinese in foreign employment killed or injured in the performance of their duties to their foreign employers were presented to the Chinese Mixed Claims Commission of 1912. See also claims of legation guards killed or wounded during siege of Peking, Sec'y of State Hay to Mr. Conger, Feb. 19, 1901, For. Rel., 1901, App. 362; and claims of native servants in Chang-Sha riot claims, Mr. Knox, Sec'y of State, to Mr. Calhoun, Oct. 22, 1910, For. Rel., 1910, 352. The arrest of a Chinese employee would probably be objected to only if the arrest is made on foreign premises or where a foreign legal or business interest is directly affected. The Chinese authorities, indeed, have at times contended that notification to the consul is necessary only when the arrest is made on foreign premises.

⁴ Treaties in force, 1904, 428-434; Moore's Dig. II, § 289. Regulations have at times been framed by the Dept. of State for the guidance of American consular officers. See Ass't Sec'y Porter to Mr. Mathews, Dec. 9, 1886, 119 MS. Instructions to Consuls, 688. The claims of protégés were submitted by the U. S. to the Moroccan Claims Commission of 1910. A brief account of British treaty relations with Morocco is given in 37 Law Mag. and Rev. (Nov. 1911), 101.

The United States and various other Powers reserve the right to pass finally upon the eligibility of these protégés, as set forth in the lists furnished annually to the Sultan's Minister for Foreign Affairs at Tangier. Moreover, the foreign Legations have never recognized the claim of the Moroccan government of the right or necessity to sanction these lists.¹ The gradual extension of French influence in Morocco may ultimately bring about a modification of the protégé system.

It has been observed that the United States discourages the protégé system, and protects only definite classes of native protégés who render service to American representatives or interests. With regard to missionaries, this government likewise follows a policy of confining its diplomatic protection to American citizens, differing in this respect from the practice of some of the more important countries of Europe, which have considered themselves obligated to defend certain great faiths connected with their national history. Some measure of protective surveillance has been provided for native converts to Christianity, in that Turkey, by the treaty of Berlin,² and China, by the treaties of 1858 and 1903 with the United States,³ are under obligations not to discriminate against native converts.

The status of American citizens and their descendants who reside permanently in American communities in countries in which the United States exercises extraterritorial powers will be considered hereafter.⁴ It may here be said merely that the rules as to expatriation and the provisions of § 1993 of the Revised Statutes concerning the citizenship of children born abroad were, until recently, held by the Department of State as not applicable to the descendants of native American citizens resident in such distinctive communities.⁵ By virtue of the right

¹ The U. S., however, permits the Maghzen to register his objections to the lists of protégés, but reserves to itself the right to examine and pass upon his objections. As to the lists furnished in Tunis, see 39 Clunet (1912), 277.

² Art. LXXII, Hinckley, 110.

³ Hinckley, 119, 121.

⁴ *Infra*, § 333. Certain other topics, such as dual nationality, married women, naturalized citizens, in so far as they are related to extraterritorial jurisdiction will be discussed at more appropriate places.

⁵ This rule, which prevailed from 1887 until 1914, has very recently been changed, so that no exception is made, even in Turkey, to § 1993, R. S. Special Instructions

of the United States to determine when it will extend its extraterritorial protection, it has been decided by the Department of State that naturalized citizens in extraterritorial countries are practically on an equal footing with naturalized citizens in other countries, except that the conditions necessary to overcome the presumption of expatriation, particularly with respect to missionaries, are somewhat more liberal.¹

Seamen serving on American vessels, regardless of their nationality, are considered subject to the extraterritorial jurisdiction of the United States, and entitled to its protection.² British law and practice, on the other hand, merely protect all seamen on British vessels, but seamen who are not British subjects cannot be tried by a British consular court. They are turned over to the consul of the country of which they are nationals.³

DELEGATED PROTECTION

§ 204. Accompanying Conditions.

The government of the United States or American representatives abroad have from time to time been called upon by friendly powers or by the nationals of these powers abroad to extend the protection of the American diplomatic or consular officers at places where the friendly power had no official representative. Under such circumstances, the United States has usually authorized its representatives to employ their good offices on behalf of the subjects of the country making the request, but has on numerous occasions taken pains to make it clear (1) that the consul or minister must act informally and unofficially only; ⁴ (2) that while he becomes the agent of the foreign

No. 340, July 27, 1914, Citizenship of children born of American fathers who have never resided in the United States.

¹ Sec. 2 of Act of March 2, 1907. Circular of December 11, 1907, Expatriation and protection of Americans in Turkish dominions. *Ibid.* as to China, circular of May 13, 1908, *infra*, p. 707.

² Hinckley, 87; *In re Ross*, 140 U. S. 453; Koo, Status of aliens in China, New York, 1912, pp. 199-200. Some countries, *e. g.*, Denmark, consider the jurisdiction concurrent, *i. e.*, the national consul of the seaman and of the flag of the vessel have concurrent jurisdiction.

³ Hall, 141-142; H. Doc. 326, 59th Cong., 2nd sess., 206.

⁴ In one case, in 1871, the American minister at Caracas was authorized, with the consent of Venezuela (which was granted), to present certain claims of Italian subjects.

government in behalf of whose nationals he acts, to which government he is responsible for the discharge of his duties, he is not its official representative; (3) that the acquiescence of the government to which the agent is accredited shall be a necessary condition to the exercise of his delegated authority; and (4) that whenever the exigencies of the situation render it possible—which is always the case where the request proceeds from the foreign government seeking the assistance—the consent of his own government and of the alien's government in whose behalf he acts shall be first obtained.¹

The question has been raised whether the local government must consent to the exercise of such delegated or substituted authority.² In the absence of abnormal conditions when necessity or humanity requires prompt action and warrants a departure from strict rules, it is believed that the assent of the local government,—which as a rule is formally given upon request—is an essential condition.³

§ 205. Occasions of Exercise.

Governments request another government to act for them in the protection of their nationals (1) when they have no treaty relations with or when the number of their subjects in a certain third state is too small to warrant having an official representative permanently there resident, or (2) when they have broken off diplomatic relations

Moore's Dig. IV, 591. Other governments, *e. g.*, Germany, do not appear to limit their exercise of delegated protection so strictly. The United States has on several occasions forbidden its diplomatic officers to present the claims of foreigners to governments to which they are accredited, without specific instructions. When permitted, the act is usually limited merely to transmission of the papers.

¹ Many cases of delegated protection are reviewed or extracts from the correspondence quoted in Moore's Dig. IV, §§ 653-655. See Inst. to Dipl. officers of the U. S. (1897), § 172; Consular Regulations, 1896, § 174. The rule is well expressed by Act'g Sec'y Bacon in For. Rel., 1907, pp. 583-584, and For. Rel., 1908, pp. 210-211. See especially the Department's Circular Instruction of August 17, 1914, 9 A. J. I. L. (1915), Supplement, 118-120.

² Tchernoff, p. 386.

³ When the United States in 1896 requested of Costa Rica permission to exercise good offices on behalf of Chinese subjects, Costa Rica refused assent on the ground that Chinese immigration is prohibited by law. For. Rel., 1896, pp. 377-380. See also case in 1867 when Mexico demurred to certain U. S. representations on behalf of French and Belgian subjects. Dipl. Cor., 1867, II, 447.

with the third state and have withdrawn their official representatives.¹ Under the first head, the United States, at the request of the Swiss,² Cuban,³ Chinese,⁴ British⁵ and other governments,⁶ has on different occasions authorized its representatives abroad to extend their good offices to nationals of those states in various countries, particularly in Central and South America. It has frequently happened that in times of civil disturbance in Latin-American countries the United States has not awaited a request for protection from European or other governments, but has instructed its diplomatic and consular representatives and at times its naval officers to extend temporary protection, whenever needed, to the nationals of foreign countries.⁷ British official representatives have frequently protected American interests in Turkey and other places in the Near East.⁸

In the case of every rupture of friendly relations between two powers, resulting in the reciprocal withdrawal of official representatives, the interests of the respective countries in the other state are turned over

¹ Anzilotti in 13 R. G. D. I. P. (1906), 10. Tchernoff, 383 *et seq.* The matter is sometimes regulated by treaty in which two countries agree to extend their protection to subjects of the other when unrepresented in a third country, *e. g.*, treaty between France and Japan, Sept. 14, 1909, 39 Clunet (1912), 72-79 (patents, trademarks and copyright). Germany undertakes to protect subjects of Austria, Switzerland and Luxemburg in countries where the latter have no representatives. Laband, III, 31. See Pradier-Fodéré, III, § 1373, citing several treaties concluded between Latin-American states.

² Circulars of Sec'y of State Fish, June 16, 1871, For. Rel., 1871, p. 28; Dec. 15, 1871, For. Rel., 1872, p. 5; Sec'y Bayard to Mr. Kloss, July 1, 1887, For. Rel., 1887, p. 1077 and other notes and instructions printed in Moore's Dig. IV, § 654.

³ Circular of Sec'y of State Hay, May 24, 1902, For. Rel., 1902, p. 6.

⁴ In Guatemala, For. Rel., 1894, pp. 175, 331; *ibid.* 1896, pp. 377-380; in Nicaragua and Salvador, *ibid.* 1897, pp. 94-99, 425; in Panama, *ibid.* 1902, p. 318; In Chile and Ecuador, *ibid.* 1908, p. 59. See also other volumes of For. Rel. since 1900.

⁵ In Bolivia, For. Rel., 1902, pp. 101-102, 528.

⁶ Danish interests in Salvador, For. Rel., 1902, p. 836. As to U. S. protection of foreigners in Greece see For. Rel., 1907, pp. 583-584.

⁷ See, *e. g.*, Sec'y Root to Minister Furniss (Haiti), Dec. 5, 1908, For. Rel., 1908, p. 442; Belgian interests in Haiti, For. Rel., 1902, p. 98; Instructions to Mexico, 1912-1914, Dept. of State.

⁸ H. Doc. 326, 59th Cong., 2nd sess., 208; For. Rel., 1902, 521 (Bulgaria). See also the arbitration protocol between France and Haiti, Sept. 10, 1913, art. 1, by which France undertook to present claims of Ottoman subjects against Haiti to a French-Haitian tribunal. 8 A. J. I. L. (1914), Supp. 144, 145.

to the representatives of a third state. The usual conditions of delegated protection, particularly the consent of all three states to the exercise of the delegated protective functions, must be fulfilled. Protection under such circumstances is always a delicate duty, because it is necessary to use good offices on behalf of enemy subjects and yet maintain a strictly neutral position. The United States has undertaken this duty on several occasions: ¹ on behalf of various European powers in Mexico in 1867; on behalf of North Germans, and the subjects of other powers, in France, during the Franco-Prussian war; on behalf of Chinese and Japanese subjects, in Japan and China, respectively, during the Chinese-Japanese war; on behalf of Venezuela in France in 1895; ² on behalf of Colombia in Venezuela in 1901; ³ on behalf of British interests in South Africa in 1899; ⁴ on behalf of Japan in Russia, during the Russo-Japanese war in 1904; ⁵ and on behalf of France in Venezuela and of Venezuela in France in 1906.⁶ During the Spanish-American war, the United States confided the protection of its interests in Spanish dominions to Great Britain, and Spain, of her interests in the United States, to Austria-Hungary and France.⁷ During the withdrawal of diplomatic representatives between the United States and Mexico in the spring of 1914, the United States turned over the protection of its citizens to the Brazilian minister in Mexico City, and Mexico confided the reciprocal function to the Spanish Ambassador in Washington. Perhaps the most widely extended employment of the American diplomatic and consular service for the protection of foreign interests has occurred during the present European War, when practically all the belligerents confided the interests of their subjects in the countries of the other belligerents to the protection of the United States.⁸ In such cases the foreign government

¹ See cases set forth in Moore's Dig. IV, § 655.

² Mr. Uhl, Act'g Sec'y, to Mr. Vignaud, March 12, 1895, For. Rel., 1895, 424.

³ For. Rel., 1901, 551-553.

⁴ Mr. Adee, Act'g Sec'y, to Mr. Tower, Oct. 13, 1899, For. Rel. 1899, 350.

⁵ For. Rel., 1904, pp. 430, 714.

⁶ Mr. Bacon, Act'g Sec'y, to Mr. Russell, Jan. 9, 1906, For. Rel., 1906, p. 1432.

⁷ For. Rel., 1898, 785, 966; Moore's Dig. IV, 611-614.

⁸ By Joint Resolution approved Sept. 11, 1914, Congress appropriated \$1,000,000 to

whose nationals have profited by the delegated protection, usually reimburses the protecting government for the expenses incurred in its behalf.

SEAMEN

§ 206. American Seamen. Meaning of the Term.

A class of persons who are not necessarily citizens of the United States yet who, when serving on American vessels, are entitled to American protection, are seamen. From the beginning of our history, liberal provisions have been made for the relief and protection of seamen, regardless of their nationality, when serving on American vessels. The Consular Regulations provide ¹ that the term "American seamen" shall be held to include—

"1. Seamen, being citizens of the United States, regularly shipped in an American vessel, whether in a port of the United States or in a foreign port;

"2. Foreigners regularly shipped in an American vessel in a port of the United States; ²

"3. Seamen, being foreigners by birth, regularly shipped in an American vessel, whether in a port of the United States or a foreign port, who have declared their intention in a competent court to become citizens of the United States and have served three years thereafter on American merchant vessels."

Section 2174 of the Revised Statutes enables a seaman to become naturalized by declaring his intention to become a citizen and sub-

provide for the expenses "growing out of its representation of the interests of foreign governments and their nationals, and to extend temporary assistance to other governments and their nationals, made necessary by hostilities in Europe and elsewhere." Pub. Res. 48, H. J. Res., 337, 63rd Cong. See the detailed instructions in the Department's circular of August 17, 1914, 9 A. J. I. L. (1915), Supplement, 118-120.

¹ § 199, Consular Regulations of 1896. See also Moore's Dig. III, § 484.

² *Matthews v. Offley*, 3 Sumn. 115. 23 Op. Atty. Gen. 400, 403. Cons. Reg., 1896, § 201. Such foreigner becomes thereby "a seaman of the U. S. within the meaning of the statutes and regulations authorizing the relief and transportation, at government expense, of destitute seamen to the U. S." Opinion of State and Treasury Dept., For. Rel., 1888, 1648-1655. The statutes for protection of seamen are to be found in R. S., §§ 4535-4591. See also the recent Act of March 4, 1915, Public No. 302, an Act to promote the welfare of American seamen.

sequently serving for three years on an American vessel.¹ For all purposes of American protection, it is provided that he shall be deemed an American citizen after the filing of his declaration of intention.² This section does not apply to seamen serving on vessels in the coast-wise trade.³

Mr. Justice Field in his decision in the celebrated case of *In re Ross*, in considering the status of an alien enlisting on an American ship, said:

"By such enlistment he becomes an American seaman—one of an American crew on board of an American vessel—and as such entitled to the protection and benefit of all the laws passed by Congress on behalf of American seamen and subject to all their obligations and liabilities. . . . He could then insist upon treatment as an American citizen and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born." ⁴

A similar rule, to the effect that the flag protects the ship and every person serving thereon, has been applied by claims commissions.⁵ Both courts of Alabama claims made awards to aliens serving on American vessels, and the second court even extended this protection to British subjects.⁶

¹ *Richelieu (U. S.) v. Spain*, Span. Tr. Cl. Comm., awarded Richelieu, a native of France who had declared his intention and had served twenty years on American merchant vessels, \$5000 damages for his arbitrary arrest and imprisonment by Spanish authorities in Cuba. Van Dyne, *Citizenship*, 76. Release by Great Britain of August Piepenbrink, who had declared his intention and served four years on American vessel. *Washington Post*, Apr. 9, 1915.

² Section 2174 has been held to confer citizenship for certain purposes only, particularly protection. 17 Op. Atty. Gen. 534; 21 Op. Atty. Gen. 412; 23 Op. Atty. Gen. 400, 403.

³ Act of June 9, 1874, 18 Stat. L. 64.

⁴ 140 U. S. 453, 472. See also the case of certain Chinese sailors on American vessels, Mr. Blaine, Sec'y of State, to Mr. Stevens, Feb. 25, 1892, *For. Rel.*, 1892, 343; Moore's Dig. III, 797; Cons. Reg. 1896, § 200.

⁵ *McCready (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2536. Protocol provided for jurisdiction of claims of "citizens" of the U. S. v. Mexico. Umpire Thornton considered the service on an American vessel a presumption of citizenship, final, "unless . . . the contrary be expressly proved."

⁶ *Cassidy v. U. S.*, No. 144, Moore's Arb. 2380, 4672. *Supra*, p. 463. The first court had excluded British subjects on the ground that they were not entitled to U. S. protection as against Great Britain. *Worth v. U. S.*, No. 91, Moore's Arb. 2350.

The American citizenship which enabled the Consular Court to assume jurisdiction over a British subject in the Ross case was held by Secretary Bayard not to attach to a British subject permanently on land, although he had previously served on an American vessel.¹ It is the flag which imports nationality for the purposes of protection.

The United States, in submitting the claim of Shields, a British subject serving on an American vessel, to the Chilean Claims Commission under the treaty of Aug. 7, 1892, endeavored to secure by an exchange of notes an understanding that Chile would not object to the claim on the ground of citizenship. The jurisdiction of the commission being limited to claims of "citizens," Shields' claim was dismissed on demurrer, but the Secretary of State continued his efforts and finally secured by agreement with the Chilean minister in Washington, an indemnity of \$3500.²

A foreign seaman belonging to an American vessel who, on shore in Haiti, murdered a local policeman was held not entitled to the protection of the stipulations of United States treaties.³ Similarly, the failure to have declared his intention to become a citizen was held to deprive a foreigner belonging to an American vessel of the protection of the United States.⁴ It is somewhat difficult to reconcile these conclusions relating to the protection of foreign seamen on American vessels.

In the case of foreign-built vessels flying the American flag, which trade exclusively in foreign waters, the crews are generally made up almost entirely of foreigners, who have not acquired the character of American seamen, within the meaning of the law, by service on a registered vessel of the United States. When they ship at a foreign port, extra wages may not be demanded on their account, nor are

¹ Mr. Bayard, Sec'y of State, to Mr. Hubbard, Nov. 10, 1888, For. Rel., 1888, II, 1079.

² Shields (U. S.) v. Chile, Aug. 7, 1892, Moore's Arb. 2557-2559; For. Rel., 1891, 217 *et seq.*; For. Rel., 1900, 66-71. Shields died in 1895, so that the U. S. actually, after 1895, prosecuted a British claim.

³ Mr. Bayard, Sec'y of State, to Mr. Thompson, July 31, 1885, Moore's Dig. III, 796.

⁴ Mr. Uhl, Act'g Sec'y of State to Messrs. Goodrich, Deady and Goodrich, Apr. 10, 1894, For. Rel., 1895, I, 229, 231.

they entitled to relief as destitute American seamen under the laws providing for such relief. These seamen are not considered under the jurisdictional cognizance of the consul as to their contracts of shipment or discharge.¹ To entitle them to the diplomatic protection of the United States against a foreign government either the injury complained against must have been sustained while actually serving under and receiving the protection of the American flag or else the seamen must have complied with one of the alternatives of § 2174 of the Revised Statutes.

It has already been remarked that the jurisdiction of American consular courts in countries in which the United States exercises extraterritorial privileges extends over all persons duly shipped and enrolled upon the articles of any vessel of the United States,² whatever be the nationality of such persons.³

VESSELS

§ 207. Evidence of Nationality.

The flag of a vessel has come to be regarded as the outward symbol of its nationality, of which it is *prima facie* evidence.⁴ Each country determines for itself the conditions for the use of its flag upon its vessels, the United States rule being that vessels *bona fide* owned by citizens of the United States are entitled, when abroad, to carry the flag of the United States irrespective of the papers they may have on board.⁵

The ship's papers of a mere international character and value appear to be the sea-letter, passport,⁶ and bill of sale. The passport

¹ Sec'y Evarts' Circular to consular officers, Feb. 18, 1880, For. Rel., 1880, 1.

² As to what are "vessels of the United States," see Moore's Dig. II, § 324. For purposes of protection, the term is not confined to the provisions of R. S., § 4131.

³ *Supra*, p. 471. Consular Regulations, 1896, § 629. The British practice is somewhat different. Hall, Foreign powers and jurisdiction, 141. See also Moore's Dig. II, § 261, and H. Doc. 326, 59th Cong., 2nd sess., 206.

⁴ Castillon de Tramont, P., De la nationalité des navires, Montauban, Forestié, 1907; Moore's Dig. II, § 321, quoting Calvo, I, §§ 426-428. See also *The Vrow Elizabeth* (1803), 5 C. Rob. 4; *The William Bagaley* (1866), 5 Wall. 377, 410; Art. 57 of the Declaration of London.

⁵ Mr. Bayard, Sec'y of State, to Mr. Tree, Dec. 19, 1887, For. Rel., 1888, I, 28.

⁶ For a full discussion of the maritime passport and the difference between a passport and sea-letter see Moore's Dig. II, § 325.

or the sea-letter is the formal voucher of the ship's national character. Lord Stowell said that "a bill of sale is the proper title to which the maritime courts of all countries would look."¹

The distinction made in municipal law between registered and unregistered vessels,² *i. e.*, American-built and foreign-built vessels, is not made in international law, and both classes, if owned by American citizens, are equally entitled to American protection. This has been reiterated many times by secretaries of State, secretaries of the Treasury and Attorneys General.³ The distinction between the various classes of vessels under the navigation laws of the United States is important only for commercial purposes, registered and enrolled vessels enjoying certain special privileges.⁴ The various documents issued to such vessels, such as the register, enrollment or license are not required by international law and are *prima facie* evidence only of ownership and therefore of the nationality of the vessel.⁵

The internationally conclusive character of a certificate of American registry came up for discussion in the celebrated *Virginus* case.⁶ This vessel had fraudulently obtained American registry by the fact that the American citizen in whose name she was registered made a

¹ *The Sisters*, 5 Rob. 155.

² As to the vessels entitled to registration see R. S., § 4132, as amended by the Act of August 24, 1912, 37 Stat. L. 562, the Act of May 10, 1892, 27 Stat. L. 27, and the Act of August 18, 1914, Public No. 175, 63rd Cong., 2nd sess., 698. Sections 4133 and 4134, R. S., have been repealed. The statutory provisions governing registry and recording are to be found in R. S. § 4131 *et seq.*, 7 Fed. Stat. Ann., p. 3 *et seq.* The general effects of registry and the position of foreign-built but American-owned vessels is discussed in Moore's Dig. II, § 322.

³ Moore's Dig. II, § 323.

⁴ As to the privileges of registered and the disabilities of unregistered vessels, see Moore's Dig. II, 1031-1033.

⁵ *U. S. v. Armistad*, 15 Peters, 518; 6 Op. Atty. Gen. 649.

⁶ Moore's Dig. II, 895 *et seq.*, 967, 980-893 and Wharton's Dig. III, § 327, pp. 147-159, where the case is fully discussed. Attorney General Williams' opinion in 14 Op. Atty. Gen. 340 is supported by Wharton, III, § 409, who places certificates of naturalization and certificates of registration of a vessel on the same footing, namely, that their validity cannot be impeached by any foreign power, except by application to the United States, which is the sole judge of their validity. It is of course true that a foreign power which acts on its assumption that an American document has been fraudulently obtained or displayed, by a direct exercise of jurisdiction, assumes a grave responsibility.

false oath as to ownership, which in fact was vested in certain Cuban residents of New York. She carried a hostile expedition to Cuba, and while flying the American flag, was seized on the high seas by a Spanish war-vessel. The Attorney General held that notwithstanding her false registry, she was exempt from interference on the high seas by any foreign power. Spain had seized the vessel in self-defense, and the United States in effect admitted the right of Spain to question the validity of her registry by undertaking to dispense with any salute to the American flag if it were proved that she sailed under a false register and was not legally entitled to fly the American flag.¹ The better opinion, therefore, would seem to be that a register or any other document of nationality or even the flag is only a *prima facie* and not an internationally conclusive evidence of nationality,² although for belligerent purposes, "subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly."³ For a foreign power in time of peace to arrest on the high seas a vessel carrying the United States flag involves a grave responsibility, and in fact practically the only circumstance under which such arrest has been excused is where there was probable cause to believe that the flag had been assumed for piratical purposes.⁴ The question of proving the nationality of vessels in the absence of papers has frequently been before the United States courts in cases of piracy.⁵

§ 208. American Ownership the Test of Title to Protection.

The employment of an American vessel in the internal trade of a

¹ This implied admission would probably not have been made to any third country. It will be recalled that the *Virginius* was owned by Cubans, Spanish subjects.

² Woolsey, International law, § 214, quoted in Moore's Dig. II, 981. Article XI of the treaty of July 3, 1902 between the U. S. and Spain, however, provides that "All vessels sailing under the flag of the U. S. and furnished with such papers as their laws require, shall be regarded in Spain as U. S. vessels," and the reciprocal provision applies to Spanish vessels in the U. S.

³ Article 57 of the Declaration of London. The rules respecting transfer of flag have been referred to, *supra*, p. 255.

⁴ Wharton's Dig. III, § 408.

⁵ *E. g.*, *U. S. v. Jones* (1813), 3 Wash. C. C. 209. See also decisions under the Mutiny Act of 1835 and under the revenue laws and recording acts.

foreign country will subject it to the laws of that country and will suspend the privileges attaching to its American registry during the period of its foreign employment.¹ But even when operating under a foreign coasting license, if owned by American citizens and sailing under the American flag, protection will be extended against unjust treatment, notwithstanding the foreign domicile of its owners.²

The fact that ownership alone and not registry or flag is the criterion of title to American protection is illustrated in the case of the *Alliance*, where an American citizen fraudulently registered his vessel in the name of a Dominican in order to take advantage of Dominican coasting trade laws. She carried the Dominican flag. Yet the Arbitral Commission of 1903 adjudicating claims of the United States against Venezuela held that the register being *prima facie* evidence of ownership only, the actual ownership of the vessel could be proved like any other fact, and inasmuch as she was owned by an American citizen, she possessed all the rights of American property.³

Another proof of the fact that American ownership of a vessel is the final criterion of its right to fly the American flag and of its title to American protection is clearly shown by the many cases of foreign-built vessels (navigating exclusively in foreign waters) which are owned by citizens of the United States. Numerous vessels of this character trade in the Far and Near East and in other parts of the world.⁴ These vessels cannot be registered, and they are under numerous commercial disabilities under the navigation laws of the United States, but if purchased of foreign owners and owned by citizens of

¹ Mr. Seward, Sec'y of State, in Instructions printed in Moore's Dig. II, 1071-1072. See as to the application of a Honduran navigation law to foreign vessels, correspondence in For. Rel., 1909, p. 366 *et seq.*

² *Infra*, p. 482. See, however, *infra*, p. 695.

³ The *Alliance* (U. S.) v. Venezuela, Feb. 17, 1903 (Bainbridge, U. S., for the Commission), Ralston 29, 31, citing U. S. v. Pirates, 5 Wheat. 184 and U. S. v. Amedy, 11 Wheat. 409. See Wharton's Dig. III, § 410. Yet where a certain bark flying the Hawaiian flag, but actually owned by an American citizen, was arrested for smuggling opium, the U. S. representative declined to intervene. Mr. Comly to Sec'y Evarts, Dec. 22, 1879, For. Rel., 1880, 592.

⁴ On the right of protection of American-owned foreign-built vessels see the elaborate opinions and Instructions set forth in Moore's Dig. II, § 323, and Wharton, III, § 410.

the United States, whether purchased of belligerents or neutrals during a war to which the United States is not a party, or in time of peace, they are entitled to the protection and flag of the United States as the property of an American citizen, provided, however, that the purchase shall have been made in good faith.¹ Even a foreign captain of such a vessel would seem to enjoy American protection² and United States consuls abroad appear to have the same jurisdiction over the vessel and its equipment as in the case of any documented vessel of the United States.³

As will be seen hereafter, the United States often protects foreign corporations, the greater part of whose stock is held by American citizens. In a recent case in which the Department of State was requested to extend protection to a vessel, flying the Mexican flag, owned by a Mexican corporation the bulk of whose stock, it was alleged, was held by American citizens, the Department informed the American citizens that while there was some precedent which warranted the United States in extending protection to the corporation, no protection could be given to the vessel flying the Mexican flag.

For belligerent purposes, the rule is practically uniform that the nationality of a corporation owning a vessel is that of the state under whose laws it is incorporated and whose flag the vessel flies, regardless of the nationality of the stockholders.⁴

¹ Article XX of the Consular Regulations, 1896, and the Treasury Regulations contain detailed provisions as to the sale and transfer of these undocumented vessels, the consul's responsibility as to the good faith of the transaction (§ 344, Cons. Reg.), and the record of the bill of sale, certificate to be issued, etc. (§ 343 Cons. Reg.). Sections 341-349 of the Consular Regulations are printed in Moore's Dig. II, 1038-1041. See as to good faith of purchase, For. Rel., 1879, 180.

² But where the captain of a vessel in Turkey was an Ottoman subject (The *Nevada*) the Department of State was of the opinion that it would not be warranted in withholding him from Turkish jurisdiction, nor in presenting a claim on his behalf to the Turkish government. The same rule governed the claims of Turkish officers serving on the vessel. But where the Captain was a national of a third state (Greece) the U. S. protected him against the assumption of jurisdiction by Turkey. The *Texas v. Turkey*, 1913-1914.

³ Moore's Dig. II, 1045. The fiction that a vessel constitutes in contemplation of law an extension of the territory of the country of its flag is ably discussed by Westlake, I, 175. See *Field v. U. S.*, 27 Ct. Cl. 224.

⁴ See cases set forth in article by Russell T. Mount in 15 *Columbia L. Rev.* (1915),

The principle that the citizenship of the actual owner of a vessel is the test of title to national protection is somewhat affected in time of war for purposes of prize law by the doctrine of trade domicile as conferring national character.¹ But the neutral nationality of a vessel as determined by its flag is not lost by the fact that when captured it is under time charter to a subject of the enemy.²

It has been held on several occasions that the flag covers the cargo, and that the American shippers or owners of cargo on a foreign vessel or its charterers must look to the country of the flag for protection.³ The United States has nevertheless presented claims on the part of American shippers of cargo on or charterers of a foreign vessel which was wrongfully captured and condemned in a foreign prize court.⁴ If such American citizens were not thus protected, they might find themselves without any national protection, for the vessel is not bound, and by lack of knowledge as to ownership and conditions, is not generally in a position, to make claim for captured cargo. When ship and cargo, in the case of a vessel wrongfully captured or condemned, are owned by nationals of different countries, it is not unusual for their governments to make joint diplomatic representations.

§ 209. Proper Use of Flag.

Prize courts carefully examine into the legitimacy of the transfer 332-333. See also *Continental Tyre and Rubber Co. v. Daimler* (1915), 1 K. B. 893, and *J. E. Hogg* in 31 *Law Quar. Rev.* (1915), 170-172.

¹ *Infra*, § 245. *Ferrer (Mexico) v. U. S.*, July 4, 1868, *Moore's Arb.* 2721 (*dictum*).

² The *Thea*, *Hurst & Bray*, *Russian & Japanese Prize Cases*, I, 96, 108.

³ Mr. Bacon, Act'g Sec'y of State, to Mr. Furniss, Nov. 28, 1908, *For. Rel.*, 1908, p. 440; Mr. Olney, Sec'y of State, to Mr. Reymershoffer, Oct. 24, 1896, *Moore's Dig.* II, 1003; *Ferrer (Mexico) v. U. S.*, July 4, 1868, *Moore's Arb.* 2721 (under terms of art. 16 of the treaty of 1831). But in the *Nevada (U. S.) v. Turkey*, the U. S. declined to present a claim on behalf of a Portuguese, Mr. Zouros, owner of cargo on this American vessel, and a similar rule was followed in the case of the foreign-owned cargo on the American ship *William P. Frye*, sunk by the German cruiser *Prinz Eitel Friedrich* in Jan. 1915.

⁴ *S. S. Arabia (U. S.) v. Russia*, *For. Rel.*, 1904 and 1905 and later correspondence; *S. S. Oldhamia v. Russia*, *U. S. correspondence*, 1910, *Parl. Pap. Misc. No. 1* (1912), Cd. 6011; *S. S. Antiope (U. S.) v. Japan*, 1912-13. The first was a German, the two latter British vessels. The fact that American merchants shipped their goods on British vessels during the Civil War was held not to disentitle them to the protection of the United States. (*The Pacific Mills v. U. S.*, No. 793, *Moore's Arb.* 4673.)

of enemy vessels to subjects or the flag of neutral states either shortly before or during war. Before the Declaration of London, which has been ratified by but few of the signatories, the practice of maritime powers differed greatly. According to Anglo-American practice such a transfer to a neutral flag was recognized as valid, provided: (1) it was *bona fide*, (2) "was not effected in a blockaded port or while the vessel was *in transitu*," (3) the vendor did not retain an interest in the vessel or did not stipulate a right to recover or repurchase the vessel after the conclusion of the war, and (4) "the transfer was not made *in transitu* in contemplation of war."¹ According to the French and Russian practice, a transfer of flag effected after the outbreak of war is considered illegal, and not merely presumed to be invalid.² The Declaration of London in articles 55 and 56, provides a series of rules with a view to furnish presumptions and criteria as to the legitimacy of the transfer.³

The courts of *Alabama* claims held that a colorable transfer of an American vessel to the British flag, in order to rescue her from the hands of the captors, did not forfeit the protection of the United States.⁴

Every country has a great interest in the proper use of its national flag abroad, both on vessels and elsewhere. The United States has on more than one occasion successfully protested to foreign countries against the abusive display of the American flag on property or vessels not American, and on its own part has endeavored to prevent every improper use of the flag.⁵ The government may of course decline to protect a vessel wrongfully flying the American flag.⁶

A vessel of the United States may forfeit its right to American protection by entering into the service of a foreign power as an auxiliary

¹ Oppenheim, II, § 91, p. 118. This question is concisely presented by Oppenheim, with the decisions in support and the provisions of the Declaration of London.

² A good collection of prize cases in which the question of transfer of flag was involved, is presented in Russell T. Mount's article in 15 Columbia L. Rev. (1915), 327-333. *Supra*, p. 255. See also J. W. Garner in 49 Amer. L. Rev. (1915), 321-348.

³ The details are set forth in Oppenheim, II, § 91 and in the works by Bentwich and Cohen on the Declaration of London.

⁴ *Tyler v. U. S.*, No. 4438, class 1, Moore's Arb. 4673.

⁵ Moore's Dig. II, 135-138.

⁶ Case of the *Itata*, Mr. Gibbs to Sec'y Evarts, Mar. 19, 1879, For. Rel., 1879, 861.

to military or naval operations.¹ So the acceptance of a privateering commission from a foreign country by an American citizen and the display of the foreign flag on his vessel will serve to deprive him of American protection for all purposes connected with the privateering expedition in which he is engaged.² Any violation of the neutrality laws of the United States or of his neutrality as an American citizen, may operate to deprive an American citizen of his right to American protection.³

¹ Mr. Fish, Sec'y of State, to Mr. Bassett, Sept. 15, 1869, Moore's Dig. II, 1073.

² *Medea and Good Return* (U. S.) v. Ecuador, Nov. 25, 1862, Moore's Arb. 2736.

³ *Infra*, § 358 *et seq.*

CHAPTER II

PROOF AND EVIDENCE OF CITIZENSHIP

§ 210. By Whom Determined.

It is asserted as a principle that among the attributes of sovereignty is the right of a government to determine the conditions and qualifications of citizenship and to decide who shall be deemed citizens.¹ The United States has denied the right of a foreign government to impeach the documentary evidence of citizenship furnished to an American citizen by this government, but it has admitted the right of a foreign government to traverse the evidence of the passport by showing fraud in its procurement or illegal naturalization or forfeiture of the right to protection.² However, the final determination of the validity of the citizenship is reserved exclusively for the United States.³

There has been some expression of opinion in the Department of State to the effect that the presentation of a claim, on behalf of a claimant alleged to be an American citizen, to an international commission, should preclude all examination by the commission into the citizenship of the claimant,⁴ on the ground that the Department's determination should be considered final. International commissions, however, have freely assumed the right to pass upon the citizenship of a claimant, testing it in first instance by the municipal law of

¹ *Wilson (U. S.) v. Chile*, Aug. 7, 1892, Moore's Arb. 2554; Mr. Gresham, Sec'y of State, to Mr. Tripp, Sept. 4, 1893, For. Rel., 1893, 23-24. *Supra*, p. 7.

² Mr. Adec, Act'g Sec'y of State, to Mr. Lee, Aug. 13, 1907, For. Rel., 1907, II, 589-590; Mr. Uhl to Mr. Hengelmüller, May 8, 1895, For. Rel., 1895, I, 10.

³ Mr. Bayard, Sec'y of State, to Mr. McLane, Feb. 15, 1888, For. Rel., 1888, I, 511.

⁴ Sec'y Blaine appears also to have taken this view. Mr. Blaine to Mr. Durant, August 22, 1881, MS. Dom. Let., Van Dyne, Citizenship, 107. Several Solicitors and Assistant Solicitors appear to have supported Mr. Blaine's view. Prof. Basdevant criticizes some of the decisions of the Venezuelan Arbitrations of 1903 in which the Umpire denied the right of a claimant to the citizenship of the country which supported his claim. 5 R. D. I. Privé (1909), 41-63, particularly the Corvaia case (Italy), p. 45, and the Flutie case (U. S.), p. 48.

the claimant's country.¹ For example, when Sir Edward Thornton became umpire of the mixed claims commission between the United States and Mexico under the treaty of July 4, 1868, he acted on the principle that the term "citizenship" in the convention meant citizenship according to the law of the contracting parties, and declined to recognize a declaration of intention or domicile, singly or together, as conferring citizenship.²

In the protocols for the submission of claims to arbitration, it is occasionally provided that the defendant country may contest the validity of the citizenship of the claimant.³ The frequent occurrence of cases of dual nationality,⁴ by which a claimant, owing to a conflict of laws, becomes a citizen of both the claimant and the defendant country according to the municipal law of each, has resulted in a general preference by international commissions in favor of the law of the defendant country, so as to preclude the possibility of a country being made a defendant to an international claim by a person who by its municipal law is considered its own citizen. In a few cases, international commissions have essayed to determine a claimant's citizenship by rules of international law, rather than by the municipal law of either the claimant or defendant country, as, for example, in cases where trade domicile has been held to confer nationality for international purposes.⁵

¹ *Ancira, Attorney (Mexico), v. U. S.*, July 4, 1868, Moore's Arb. 2453; *De Acosta y Foster (U. S.) v. Spain*, Feb. 12, 1871, *ibid.* 2462. As we shall see, certificates of naturalization have been frequently impeached by claims commissions. *Infra*, § 226.

² *Zamacona*, Mexican commissioner, acted on the same principle. Moore's Arb. 2720.

³ Protocol of Feb. 12, 1871, between U. S. and Spain, Art. 5, Malloy's Treaties and conventions, II, 1663. A protocol added to the convention of Nov. 1, 1895, for the settlement of British claims against Nicaragua, provides "that Her Majesty's Government will not support the claim of any person before the commission unless they consider him to be a British subject, and on their part the Nicaraguan Government will accept such status as duly established, subject to the production of proof that the claimant is not entitled to it, in contemplation of English Law." For. Rel., 1896, 307.

⁴ § 253 *et seq.*

⁵ *Sec. e. g., Laurent (Gt. Brit.) v. U. S.*, Feb. 8, 1853, Moore's Arb. 2675 and *infra*, §§ 245, 246.

PROOF OF CITIZENSHIP

§ 211. Methods of Proof.

Citizenship being ordinarily an essential condition of protection, it will be of interest to examine the various methods by which citizenship may be proved. A passport, for example, as one of the most usual evidences of citizenship, is in its terms a statement that the holder is a citizen of the United States. The Department of State, therefore, requires an applicant for a passport clearly to establish his citizenship.¹

The principal methods of proving American citizenship are by evidence of birth or of naturalization in the United States. Birth is usually proved by affidavit, and international commissions generally accept this as sufficient in the absence of dispute or suspicious circumstances.² Birth certificates, duly authenticated by the states issuing them, are accepted by the Department of State as evidence of American citizenship. Unfortunately, there are still many states which have no adequate birth registration laws. In the circular instruction of April 19, 1907, providing for the registration in consulates abroad of women, the widows or divorced wives of aliens or of American citizens, who desire to resume or retain American citizenship, as the case may be, it is prescribed that if the woman is a native citizen, documentary evidence of such citizenship need not be required unless the consul entertains doubts as to the statements made to him, in which case a certificate of birth or the affidavit of a credible witness known to him may be demanded.

The best evidence of naturalization is the judicial record of naturali-

¹ As will be seen, however, it is not obligatory to issue a passport to every citizen who desires it, so that the rejection of an application is not necessarily a denial by the Department or its agents of the American citizenship of the person whose application is rejected.

² *Wilkinson (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2532. But in *Suarez (U. S.) v. Mexico*, *ibid.* 2449, the oath as to birth and certificate of baptism were held by Thornton, as insufficient proof, on the ground that identity of claimant with child baptized was not proved. In *Barco and Garate (U. S.) v. Mexico*, *ibid.* 2449, he held that birth in U. S. of alien parents, followed by departure from U. S. while under age, did not establish U. S. citizenship. This appears clearly a mistake of law, at least according to U. S. municipal law.

zation or an exemplified copy thereof. Naturalization may be proved by parol evidence only in case the record has been lost or destroyed.¹

A passport issued by the Department of State has been held by municipal courts as incompetent judicial proof of citizenship,² but, as will be noted, internationally, the United States has insisted upon its passport being accepted as *prima facie* evidence of citizenship.³

When satisfactory evidence is furnished that the record has become lost, destroyed or mutilated or could not for good and sufficient reasons be found, it has been held that secondary evidence to prove naturalization will be admitted.⁴ Municipal courts have on several occasions construed the facts of long residence in the United States and the exercise of the voting privilege as tending to show naturalization and citizenship.⁵ International commissions have not been so liberal.⁶

As the judicial branch of the government is charged with the duty of naturalizing aliens and is invested with appropriate powers for determining matters of fact which are essential to decide the question of naturalization, the Department of State has uniformly held that it is beyond its power to assert that a certain person is a naturalized citizen of the United States in the absence of judicial proof of the fact.⁷ Thus where a record of naturalization has been lost or destroyed, it is for the courts to hear the evidence of the loss and remedy it.⁸

It has been uniformly held that proof of a declaration of intention is not sufficient evidence of naturalization.⁹

¹ *Green v. Salas*, 31 Fed. Rep. 106. See other cases in municipal courts cited in Moore's Dig. III, §§ 420, 421, in H. Doc. 326, 59th Cong., 2nd sess., 127-130, and in Van Dyne, *Naturalization*, 129-133.

² *In re Gee Hop*, 71 Fed. Rep. 274; *Urtetiqui v. D'Arcy*, 9 Peters, 692; *Edsell v. Mark*, 179 Fed. Rep. 292.

³ *Infra*, p. 517.

⁴ *Martin (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2540; *Steinthal*, *ibid.* 2540; *Wolfe*, *ibid.* 2539; *Van Dyne*, *Naturalization*, 132; Moore's Dig. III, § 421. The Department of State occasionally accepts secondary evidence.

⁵ See cases cited in Moore's Dig. III, 497-498.

⁶ *Infra*, p. 491.

⁷ See communications of Sec'y of State Blaine printed in Moore's Dig. III, 498.

⁸ *Mr. Bayard*, Sec'y of State, to *Mr. Ferguson*, *ibid.* 498. For purposes of protection, the Department occasionally accepts secondary evidence.

⁹ *Infra*, § 247.

§ 212. Rules of International Tribunals of Arbitration.

International commissions acting under special treaties or rules of their own often provide for special methods of establishing citizenship, and have had occasion to pass upon various forms of evidence of citizenship. In each case, it is important to consult the treaty or protocol of arbitration under which the commission is acting. The domestic commission under the convention with France of July 4, 1831 held that the executive determination of the fact of citizenship did not authorize the commission to deny the privileges of citizenship to an American who had neither renounced them in terms, nor by assuming a hostile attitude towards a foreign nation, had authorized that nation to treat him as its enemy.¹

The claims commission under the treaty of July 4, 1868 with Mexico, passing upon the claims of citizens of either country against the other, issued an order which required native citizens to state the place and date of their birth. Various forms of evidence of citizenship were presented to this commission, which resulted in some interesting decisions concerning proof of naturalization and citizenship. For example, a certificate from the Governor of a Mexican State attesting claimant's citizenship, supported by other evidence, was accepted as proof of citizenship,² but certificates executed by minor officials were rejected.³ Similarly, recognition of citizenship by a consul or a certificate from a consul,⁴ or aid furnished by the American minister,⁵ were held each as insufficient evidence of citizenship.

¹ Kane's notes, Phila. 1836, p. 16.

² Garay (Mexico) *v.* U. S., July 4, 1868, Moore's Arb. 2532.

³ Warner (Mexico) *v.* U. S., *ibid.* 2533 (sub-political chief of a Mexican district); Wolfe (U. S.) *v.* Mexico, *ibid.* 2539 (passport and certificate from a Mexican colonel of infantry). Of course, claimant's declarations, supported only by persons interested in the claim, were rejected as proof. Spencer (U. S.) *v.* Mexico, *ibid.* 2768 (note). To effect that opinions of witnesses are incompetent to prove citizenship, see Valentiner (Germany) *v.* Venezuela, Feb. 13, 1903, Ralston, 564.

⁴ Brockway (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 2534; Goldbeck (U. S.) *v.* Mexico, *ibid.* 2507. See also Gilmore (U. S.) *v.* Costa Rica, July 2, 1860, *ibid.* 2539.

⁵ Tipton (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 2545. But such official recognition by several U. S. ministers and the minister of foreign affairs combined with circumstantial evidence of naturalization and direct evidence of a declaration of intention was considered by Thornton, Umpire, as proof of claimant's citizenship. Pradel (U. S.) *v.* Mexico, *ibid.* 2543. Recognition of claimant's American citizen-

Service of a claimant in the Mexican navy was regarded as a method of electing Mexican citizenship, in view of a Mexican law which considered such service as a form of naturalization.¹ But service in the United States military forces, while requiring an oath of allegiance during the term of service, did not entitle a claimant to appear as an American citizen.² In the absence of proof to the contrary, service on an American merchant vessel was held to create a presumption of American citizenship.³

The mere exercise of the voting privilege in a state has been held by international commissions neither to confer American citizenship,⁴ nor to deprive a foreigner of his alienage.⁵

Enrollment in the register of a Spanish consulate in Venezuela, it appearing that such registration was only granted after proof of Spanish nationality, was accepted by the umpire of an international commission as *prima facie* evidence of Spanish nationality.⁶

The United States-Mexican commission of 1868, before Thornton became umpire, also held that a declaration of intention, together with an established domicile in the United States, made claimant a citizen within the meaning of the protocol conferring jurisdiction over claims of "citizens" of the United States.⁷

ship by Mexican and U. S. authorities obviated the non-production of naturalization papers in *Remer et al. (U. S.) v. Mexico*, Act of Mar. 3, 1849, *ibid.* 3343.

¹ *Martin (U. S.) v. Mexico*, *ibid.* 2467, and other cases there cited. But an artisan repairing gun carriages was held not in the military service. *Cole (U. S.) v. Mexico*, *ibid.* 2468.

² *Pagliari (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2468. So held as to service of foreigner in the U. S. merchant marine. *Shields (U. S.) v. Chile*, Aug. 7, 1892, *ibid.* 2557. But see *supra*, p. 477.

³ *McCready (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2537.

⁴ *Gatter (U. S.) v. Mexico*, *ibid.* 2547 (even if accompanied by twenty years' residence). *Pugos (U. S.) v. Mexico*, *ibid.* 2548. See also *Gerrard's case*, 43 Ct. Cl. 67.

⁵ *Sharpe (Gt. Brit.) v. U. S.*, May 8, 1871, *Moore's Arb.* 2548, *Hale's Rep.* 15. But proof of claimant's having voted as an American citizen was held to cast doubt on his Mexican citizenship, and to offer a presumption against his Mexican citizenship which must be rebutted. *Barrios (Mexico) v. U. S.*, July 4, 1868, *ibid.* 2535. See also the still stronger cases of *Schaben (U. S.) v. Mexico*, *ibid.* 2541, and *Cabazos (Mexico) v. U. S.*, *ibid.* 2543, *Lieber, Umpire*.

⁶ *Esteves (Spain) v. Venezuela*, April 2, 1903, *Ralston*, 922.

⁷ *Wadsworth, U. S. commissioner*, and *Lieber, umpire*, in *Sprotto (U. S.) v. Mexico*, *Moore's Arb.* 2717. But Thornton, when he became umpire, declined to follow

The effect of a provision of the Mexican constitution of 1857, according to which foreigners became Mexican citizens by the purchase of real estate in Mexico, unless a contrary intention were expressly manifested, was construed in a number of cases coming before the mixed claims commission under the treaty of July 4, 1868. The provision was held merely permissive and designed to confer a benefit, making Mexican citizenship optional with the alien, and not obligatory and intended to impose a disability, so as to force Mexican citizenship upon an alien.¹ Nor did the purchase of land in territory not open to alien purchase serve to prove citizenship.² But a request for permission to become a Mexican citizen in order to purchase land in a frontier state, followed by such purchase, was held a proof of citizenship.³

A claim to American citizenship by reason of the annexation of territory was held to require for its support proof of citizenship or residence in the territory annexed.⁴

EVIDENCE OF CITIZENSHIP

§ 213. Classes of Documentary Evidence.

The customary documentary evidences of American citizenship having an international value are the passport, the certificate of naturalization, and the certificate of registration issued under paragraph 172 of the Consular Regulations.⁵ Of these three certificates, the passport is the most important for international purposes, and its relation to diplomatic protection abroad warrants special and detailed examination.

this and similar decisions. *Wilkinson (U. S.) v. Mexico*, *ibid.* 2720 and *infra*, p. 575.

¹ See Mr. Ashton's argument printed in Moore's Arb. 2468-2477. *Anderson and Thompson (U. S.) v. Mexico*, *ibid.* 2479 and 2482. Same rule, notwithstanding claimant's intention to reside permanently in Mexico (*Elliott v. Mexico*, *ibid.* 2481), and long residence in Mexico (*Bowen v. Mexico*, *ibid.* 2482). See also *Robert v. Mexico*, *ibid.* 2477, where American citizenship was expressly preserved and recognized.

² *Morton (U. S.) v. Mexico*, *ibid.* 2477. (Lieber held that it merely showed the purchase to have been void.)

³ *Prim (U. S.) v. Mexico*, *ibid.* 2482.

⁴ *Masson (U. S.) v. Mexico*, *ibid.* 2542; *Vallejo (U. S.) v. Mexico*, *ibid.* 2534.

⁵ See circular instruction, April 19, 1907, Registration of American Citizens, For. Rel., 1907, I, 6.

THE PASSPORT

§ 214. Nature and Purpose of Passport System.

The issuing of passports is a convenient system adopted by states to secure for their citizens a right of transit through foreign countries, which permission might in international legal theory be withheld. Technically, the *foreign* country grants the citizen the passport, and accepts his certificate of citizenship as a title to the right, accorded by all civilized states, of unobjectionable foreigners to pass through. In those countries which even in time of peace exercise strict supervision over aliens entering and residing, the local or national visé on the certificate corresponds to the technical passport. In practice, the certificate itself has received the name passport and actually serves that purpose, being often, if not unregulated by foreign officials, at least only inspected, the visé, where it is affixed, serving merely as evidence of inspection.

The passport is the accepted international certificate or evidence of citizenship, although its evidentiary value is *prima facie* only. In the practice of the United States, it is issued by the Secretary of State or under his authority by a diplomatic or consular officer. It certifies that the person therein described is a citizen of the United States and requests for him while abroad permission to come and go as well as lawful aid and protection.¹

§ 215. Relation of Passport to Diplomatic Protection.

The passport is a *prima facie*, though not a final, warrant of diplomatic protection. Possession of a passport does not always carry

¹ The American passport, its history and a digest of laws, rulings and regulations governing its issuance by the Department of State, by Gaillard Hunt. Washington, 1898, p. 4; Moore's Dig. III, §56. Mr. Hunt's work, the American passport, gives a full history, with forms, circulars and rules and regulations bearing on the issuance of the passport by the Dept. of State. Prof. Moore's chapter on passports (XII), Digest, III, pp. 855-1022 contains a valuable account, illustrated by diplomatic notes, of the practice of the Dept. of State and of foreign countries in regard to the United States passport. The rules of 1907, and the amended rules of 1914-1915, entailed by the problems incidental to the European War, are not, of course, noticed, the work having been published in 1906. A less systematic collection of notes and instructions of secretaries of State and diplomatic officers is contained in Wharton's Digest, 2nd ed., II, §§ 191-195. On the English passport, see an article by N. W. Sibley in 7 Journ. of the Soc. of Comp. Leg. (1904-05), 26-33.

a guaranty of protection, nor does the refusal to issue one indicate a definite forfeiture or withdrawal of protection. The passport is issued under statutory authority (Revised Statutes, §§ 4075, 4076), and while it has been held by the Attorney General that its issuance under the statute is discretionary with the Secretary of State,¹ still the compliance by a law-abiding American citizen with the terms of the statute and the rules prescribed, will usually be followed by the issuance of the passport.² The extension of diplomatic protection, however, being but slightly limited or controlled by statutory provisions, involves the exercise of a far wider discretion, so that the mere possession of a passport will under many circumstances not carry with it the right to diplomatic protection. Thus, the inequitable conduct of the citizen even though in possession of a passport has in several cases operated as a forfeiture of diplomatic protection and warranted its withdrawal by the government (*infra*, § 338 *et seq.*).

On the other hand, diplomatic protection is a more vital right than the claim to a passport and it has been extended in cases where compliance with statutory provisions as to the issuance of a passport was impossible, or where in the exercise of discretion the passport was denied. Thus, the title to a passport having generally been limited to citizens of the United States, the free American negro, (before the adoption of the Fourteenth Amendment), the unnaturalized Indian, and the natives of Porto Rico and the Philippines (between 1898 and 1900, and 1902, respectively), though unable to secure passports, were nevertheless protected abroad by the United States. Similarly, the Secretary of State having declined on grounds of public policy to issue a passport, it does not follow that diplomatic protection will be refused in case of need for it. Protection is not dependent upon a passport, and while its possession is in international law an evidence of citizenship, its absence is not fatal to protection.³

¹ Knox, Atty. Gen., Aug. 29, 1901 (Chinese citizens of Hawaii—passport), 23 Op. Atty. Gen. 509, 511; citing Hoar, Atty. Gen., June 12, 1869, 13 Op. Atty. Gen. 72, 89. See also Moore's Dig. III, 919-923.

² Mr. Hay, Sec'y of State, in Circular—Passports for persons residing or sojourning abroad, March 27, 1899, For. Rel., 1902, pp. 1, 2.

³ Memorandum of Solicitor of the State Dept. in case of J. H. Brown, Jan. 2, 1907, printed in For. Rel., 1907, II, 1080.

Under the rules governing the issuance of passports it will be refused where desired to further an unlawful or improper purpose.¹ The causes of refusal to issue passports to citizens are many and depend upon considerations applicable to individual cases. It has been refused to an American citizen in Egypt engaged in blackmailing projects and in the endeavor to disturb the relations of this country with the representatives of foreign countries.² Yet the United States would protect such an individual in his right to a fair trial and just treatment.

Thus, while it seems clear that the right to a passport and to diplomatic protection do not entirely coincide, it is, nevertheless, true that as a general rule the issuance of a passport will carry with it the protection of the government and its refusal may be interpreted as a denial of protection. The cases in which its issuance has been refused on the ground that protection is not properly due will be considered hereafter under the head of limitations on protection (*infra*, § 302 *et seq.*).

The passport and the certificate of registration are practically the only documents issued by the United States operating internationally as a primary evidence of the citizenship of its citizens abroad and of their right to diplomatic protection. Other documents have been occasionally issued, as, for example, safe-conducts, issued in war time, letters of protection, documents in the nature of safe-conducts issued to American vessels, sea-letters, and particularly, so-called special passports, issued to officials travelling abroad on public business, which emphasize the personal character or position of the individual rather than his nationality.³

¹ Rules governing the granting and issuing of passports in the United States, Sept. 12, 1903. This clause has been omitted from the "Rules" of March 10, 1913, Nov. 13, 1914 and Jan. 12, 1915, but the principle is in no wise changed. Mr. Hill, Ass't Sec'y of State, to Mr. Clarke, Nov. 4, 1898, For. Rel., 1899, p. 88.

² Case of Waldberg, Mr. Wilson, Act'g Sec'y of State, to Mr. Beaupré, April 27, 1907, For. Rel., 1907, II, 1083.

³ The American passport, p. 7 *et seq.*, in which various forms of special passport, issued from time to time, are set forth. See also Moore's Dig. III, 856, 1001-1003. Safe-conducts in a form similar to special passports, have been issued occasionally to aliens. See Moore's Dig. III, 1002. For passport regulations in time of war, see Moore's Dig. III, 1015 *et seq.*

§ 216. Regulations Governing Issuance.

Up to 1856 the issuance of passports was not regulated by law. The loose methods of issuance by the Department of State, as well as by governors of states, state officials, and even notaries public, brought about complaints of foreign governments. Some of them refused in fact to recognize the documents issued by local authorities. Thereupon, the attempt was made by statute to lay down a definite practice.¹ By the act of August 18, 1856, as embodied in § 4075 of the Revised Statutes, the Secretary of State was authorized to "grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States and "(as amended by the Act of June 14, 1902, 32 Stat. at L. 386) by such chief or other executive officer of the insular possessions of the United States" and under such rules as the President shall designate and prescribe for and on behalf of the United States."

The frequently expressed demand of the United States that foreign countries accept the American passport as final evidence of citizenship has resulted in the exercise of great care in its issue and insistence upon compliance with stringent requirements by the applicant to insure the authenticity of his citizenship. The requirements of the Department of State for the issuance of a passport² are considered hereafter. The primary condition is the proof of citizenship, which in the case of native citizens, owing to the absence of birth registration requirements in most of the states of the country, consists usually of an affidavit only and in the case of naturalized citizens or those

¹ Moore's Dig. III, 862.

² The rules governing the granting and issuing of passports in the United States are revised by each incoming administration. Those in force in 1896 are set out in the American Passport, 59 *et seq.*; those of September 12, 1903 are used by Professor Moore in his chapter on passports and by Van Dyne in his work Citizenship of the United States, Rochester, 1904, 223 *et seq.* The rules of March 10, 1913, adopted by the Wilson administration, were revised and amended in important particulars by those of Nov. 13, 1914 and Jan. 12, 1915 (in force Feb. 1, 1915), the changes being necessitated by the exigencies arising out of the European War. The "Rules" issued Jan. 12, 1915 and the Instructions to Diplomatic and Consular Officers of Dec. 21, 1914 (on the basis of the rules of Nov. 13, 1914), are printed, *infra*, §§ 219, 220.

claiming citizenship through the naturalization of another, the submission of the certificate of naturalization. In certain cases secondary proof of naturalization is admitted.¹ Under the rules of January 12, 1915, a native citizen born in a place where births are recorded, is expected and may be required to submit a birth certificate with his application.

In 1907 an important change was made in the rules governing the issuance of passports. The practice of issuing passports not only by the Department of State, but by embassies and consulates of the United States in foreign countries, had seriously impaired the control of the Department over its passports and the individuals in possession of them. This was especially the case owing to the practice of the embassies in issuing successive passports to the same individual while abroad, who could thus for long periods of time supply himself with these proofs of citizenship without undertaking any of the duties of citizenship.²

By an instruction of Secretary of State Root of April 19, 1907, which quoted the Diplomatic Instructions and Consular Regulations, as amended by the executive order of April 6, 1907, it was provided that passports could not, after July 1, 1907, be issued by diplomatic or consular officers

"if the applicant has time to apply to the Department of State and await its reply. Where inconvenience or hardship would result to a person entitled to receive a passport unless he received it at once, a diplomatic officer, or a consular officer who shall have received authority to do so from the Secretary of State, may issue to such person an emergency passport, good for a period not to exceed six months from the date of issuance, and to be used for a purpose which shall be stated in the passport."

On satisfactory proof of citizenship and title to the passport submitted to the diplomatic or consular officer, the application was to be forwarded by him to the Department of State and the passport

¹ The American passport, p. 155, *et seq.*; see also with reference to the means of proof necessary for persons claiming citizenship through the naturalization of parents, For. Rel., 1901, pp. 206-208; Mr. Hay, Sec'y of State, to Mr. Porter, October 14, 1902, For. Rel., 1902, p. 420.

² Report on the subject of citizenship, expatriation and protection abroad, House Doc. 326, 59th Cong., 2nd sess., p. 14.

issued from Washington.¹ The issue of emergency passports is also restricted to cases in which the applicant is about to proceed to a country to obtain admission into which a passport is obligatory. Local authorities frequently require the possession of a passport as a condition of sojourn in the country. Emergency passports may be issued to satisfy these local requirements only in case the authorities will not accept a certificate of registration, which in accordance with paragraph 172 of the consular regulations and the provisions of the executive order of April 8, 1907, may be issued by consuls on the registration by American citizens of their citizenship, the certificates being good for one year only and renewable.²

Diplomatic and principal consular officers were, until January, 1915, authorized to extend for a period of two years a passport issued by the Department, the life of which, limited to two years, was about to expire. A passport which had expired could not be extended. No passports could be extended more than once, and emergency passports not at all. These provisions have been amended by the rules of January 12, 1915 (which will probably remain in force until the end of the European War) to the extent that a passport is now valid for six months only, and may be renewed not more than twice, for a similar period, by a diplomatic or principal consular officer, on presentation of a sworn statement of the names of the countries which the citizen expects to visit and the objects of his visits thereto.

The effect of these regulations is to centralize control in the Department of State over every bearer of a passport, in that it provides more stringent scrutiny of the authenticity of citizenship and its continued conservation by citizens abroad. It enhances the probative weight of a passport by abolishing many of the abuses which made the possession of a passport so easily possible by persons who were not *bona fide* citizens of the United States.

Passports since 1845 have always been limited in duration. Up to 1845 passports were either general or granted for a specific voyage.

¹ Circular "Issuance of Passports," April 19, 1907, For. Rel., 1907, p. 13.

² The numerous conditions for the issue of certificates of registration may be found in the Circular "Registration of American citizens," April 19, 1907, For. Rel., 1907, p. 6.

The latter class terminated when their purpose was accomplished, but the former contained no notice of their limitation. In that year, however, by a Department circular, a new passport was required each time a citizen left the country, to be renewed at least annually, the time limit of the passport up to 1873 being one year. By the circular of September 1, 1873, the duration of the passport was extended to two years from the date of issuance.¹ The following reasons have been advanced to justify the short limitations: first, the fee is the only contribution made by many citizens abroad; secondly, the government is entitled to place its grant under such conditions as would preclude it from being made the instrument of imposition either upon itself or upon foreign governments; and thirdly, to secure at reasonable intervals evidence of the conservation of American citizenship by persons residing indefinitely abroad.² Under the recent "war regulations," the duration of the passport is limited to six months, renewable, not by the Department, but by a diplomatic or principal consular officer, on the presentation of certain sworn evidence, for two periods of six months each.

Besides the regular passport issued to citizens, the issuance of other documents in the nature of passports has at times been authorized, largely to comply with requirements of local law abroad, or to cover the cases of such persons as could not comply entirely with the requirements for the issuance of a regular passport. Thus documents were issued to an unnaturalized American Indian abroad, certifying his status and name and adding that he is "a ward of the United States and is entitled to the protection of its consular and other officials,"³ and to free American negroes before the enactment of the Fourteenth Amendment, stating that they were "free persons of color born in the

¹ The American passport, pp. 54, 75; Moore's Dig. III, 977 *et seq.*

² Mr. Bayard, Sec'y of State, to Mr. Winchester, min. to Switzerland, March 28, 1887, For. Rel., 1887, p. 1060, and Mr. Hill, Asst. Sec'y of State, to Mr. Clarke, Nov. 4, 1898, For. Rel., 1899, p. 88, quoted in Moore's Dig. III, 981, 982.

On the question of fees for passports, which have varied from time to time but are now fixed at one dollar, see Moore's Dig. III, 918; The American passport, 72; Rule 2 of Rules governing the granting and issuing of passports, March 10, 1913, and Rule 3 of Rules of January 12, 1915.

³ Mr. Sherman, Sec'y of State, to Mr. Breckinridge, Amb. to Russia, April 3, 1897, printed in The American passport, 146 and in Moore's Dig. III, 879.

United States" and invoking for them all lawful aid and protection.¹ These documents were not considered as passports. Certain documents known as letters of protection were issued until 1869, when, by a circular of Secretary of State Fish, their issuance was prohibited.²

Protection papers were formerly issued occasionally by consuls in order to certify to the citizenship of the bearer, and thus meet the requirements of local law. The Department of State has forbidden consuls to issue such papers. To citizens, the Department issues passports only and it has been said in various forms and on many occasions by our secretaries of State that the passport is the only attestation of American nationality which a United States legation is authorized to give.³ The purpose of local protection papers is now served by the consular certificate of registration. Mr. Seward, Secretary of State, stated that "what are technically known as protection papers are used in our international intercourse with uncivilized nations."⁴

§ 217. To Whom Issued.

In theory, the passport as a certificate of citizenship and protection, can be issued to citizens alone, and with a few exceptions, this has been the policy of the United States. Before the Act of 1856, which confined the issuance of passports to citizens, a few such exceptions had been made, and again by the Act of March 3, 1863 (12 Stat. L. 731, 754), passports were authorized to be issued to aliens, who had made a declaration of intention, and who were, under specified conditions, liable to military duty; but this Act was repealed in 1866 (14 Stat. L. 54).⁵ The term "citizens" has not been extended to include citizens of the states, but is confined to citizens of the United States.

¹ Mr. Clayton, Sec'y of State, to Mr. D. W. C. Clark, Aug. 8, 1849, Moore's Dig. III, 880. Forms of such documents are to be found in the American passport, 15 *et seq.*

² Moore's Dig. III, 896.

³ See quotations from Mr. Seward, Mr. Bayard, Mr. Blaine and Mr. Foster in Moore's Dig. III, 857, 858.

⁴ Mr. Seward in an instruction to Mr. Asboth, min. to Argentine Republic, March 27, 1867, Moore's Dig. III, 857; see, however, the British practice which authorizes British consuls to issue protection papers for use with the local authorities, Notification of Foreign Office of August 22, 1898, 90 St. Pap. 1176.

⁵ The American passport, 44; Moore's Dig. III, 871.

At one time early in our history passports were issued to persons who had merely declared their intention of becoming citizens. They were described not as citizens, but as residents who had declared their intention.¹ This is distinctly an exception to the general rule, for leaving aside the extraordinary period between 1863 and 1866, it had been the invariable practice, up to the Act of March 2, 1907, to refuse passports to persons who had simply declared their intention to become citizens of the United States. While various secretaries of State have considered these persons entitled to some recognition and in exceptional cases to a limited protection, it was not until the Act of March 2, 1907 (34 Stat. L. 1228), that the privileges of a passport were under certain limitations extended to them. By that Act the Secretary of State was authorized in his discretion to issue passports to persons not citizens of the United States, as follows:

"Where any person has made a declaration of intention to become such a citizen as provided by law and has resided in the United States for three years, a passport may be issued to him entitling him to the protection of the Government in any foreign country: *Provided*, that such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this Government in the country of which he was a citizen prior to making such declaration of intention."

The passport was intended to furnish limited protection for a brief period to those persons, inchoate citizens, who by their declaration of intention had lost all, or some of their rights to the protection of the government to which originally they owed allegiance.

Under the Rules governing these passports, issued by Secretary of State Bryan on November 14, 1913, it is provided that such passports will be issued only when it is affirmatively shown to the Secretary of State that some special and imperative exigency requires the temporary absence of the applicant from the United States, and that

¹ Moore's Dig. III, 890; The American passport, 12, 44; Wharton's Dig. II, § 192. The Act of March 3, 1863, by which aliens who had made a declaration of intention and who were under certain conditions liable to military duty were permitted to obtain passports need not be considered an exception to the general rule, if Mr. Seward's theory is correct that by that Act these persons became naturalized citizens. Mr. Seward, Sec'y of State, to Mr. Dayton, July 20, 1863, Dipl. Cor., 1863, I, 684, quoted in Moore's Dig. III, 871-872.

without such absence the applicant would be subjected to special hardship or injury. Nor will such passports be issued to those who have made the declaration of intention and who have failed, through their own neglect, to complete their intention and secure naturalization as citizens of the United States; nor to those who may make the declaration of intention in order to secure passports and leave the United States. At least six months must have elapsed since the applicant's declaration of intention and not more than one passport will be issued to any applicant. Other specific provisions governing the issuance of this so-called "declarant's passport" are set forth in the Rules issued November 14, 1913. During the present European War, the Department of State has declined to issue declarant's passports to the subjects of the belligerent countries.

In cases of dual allegiance, it has been held that a passport should not be granted by one of the governments to which allegiance is due in order that the applicant may, while continuing to reside within the jurisdiction of the other, be exempt from its claims.¹ During the continuance of the present European War, it has been the policy of the Department not to issue passports to naturalized citizens, natives of the countries at war, except in cases of urgent necessity, the object being to avoid diplomatic controversies and difficulties engendered by conflicting claims to the citizen's allegiance, and possible drafts into military service.

The status of Cubans, Porto Ricans, and natives of the Philippines necessitated a deviation in practice and ultimately, by the Act of June 14, 1902, with reference to Porto Rico and the Philippines, a change in the law as to the issuance of passports. From the period of the treaty of peace with Spain until the independence of Cuba the United States felt called upon to extend its protection to natives of Cuba by the use of good offices and the grant of appropriate certificates. An official protection, however, was granted to Porto Ricans and to Filipinos who took the oath of allegiance to the United States.²

¹ Mr. Blaine, Sec'y of State, to Mr. Phelps, min. to Germany, Dec. 14, 1889, citing opinions of Attorneys General Hoar (1869), 13 Op. Atty. Gen. 89, and Pierrepont (1875), 15 Op. Atty. Gen. 15. Quoted in Moore's Dig. III, 885.

² For the practice of endorsing certificates of matriculation of Cubans and Porto Ricans by the legations of the United States, see For. Rel., 1900, pp. 894-895, and

The Act of June 14, 1902 (32 Stat. L. 386), changed the test of title to a passport from "citizens" to "those owing allegiance." That Act provides: "No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." This was an amendment of § 4076 of the Revised Statutes.

We have already adverted to the form of document issued to an unnaturalized American Indian and to a free negro before the enactment of the Fourteenth Amendment. In the case of naturalized citizens, full naturalization is necessary and not merely compliance with the conditions which might have obtained naturalization. Thus, the passport will not be issued to persons who have been merely soldiers in the United States Army,¹ nor to those who have served five years in the Navy followed by honorable discharge under the Act of July 26, 1894 (28 Stat. L. 124).²

When issued to a man the passport includes his wife and minor children, servant or any of them, provided the allegiance of the servant is to the United States. Issued to a woman, it includes her minor children and servant as above mentioned. A servant does not include a governess, tutor, pupil, companion, or person holding like relations to the applicant for the passport.³ Women may obtain passports on their own account, as may minors who are citizens of the United States,⁴ but they will not be issued to children of naturalized citizens born abroad who have never been in the United States and whose fathers are, or were, permanently residing abroad.⁵ They have, however, the method of issuing documents in the nature of passports as "citizens of Porto Rico or Philippines," etc., and as such "entitled to the protection of the United States," see Moore's Dig. III, 876-877. Citizens of Hawaii were by the Act of April 30, 1900 (31 Stat. L. 141), declared to be citizens of the United States.

¹ Mr. Bayard, Sec'y of State, to Mr. Endicott, Feb. 23, 1887, quoted in Moore's Dig. III, 873.

² Mr. Hay, Sec'y of State, to Mr. White, amb. to Germany, Jan. 27, 1899, For. Rel., 1899, p. 296, passport of Oscar von Wolff; reprinted in Moore's Dig. III, 874.

³ Rules governing the granting and issuing of passports, March 10, 1913, Rule 11; Rules of January 12, 1915, Rule 12. During the present European War, the practice has been adopted of stating specifically the names of all those covered by the passport, and in the case of Germany, individual passports are issued.

⁴ Citations in Moore's Dig. III, 882-883; Rule 8 of Rules of January 12, 1915.

⁵ Mr. Bayard, Sec'y of State, to Mr. Vignaud, chargé at Paris, June 13, 1888,

ever, been issued to widows with minor children, similarly residing abroad, for the purpose of preserving the right of such minor children to elect American citizenship on coming of age.¹ Children born abroad are in fact given every opportunity to preserve their American citizenship, even under circumstances where the parents, by long residence abroad, would be considered as not entitled to American protection.

§ 218. Requirements of Foreign Governments.

Most governments do not require aliens to produce a passport either on admission, or as a condition of residence, or on leaving. However, the right of foreign governments on such occasions to require passports, as in the case of Russia, Turkey, and other countries, cannot be disputed, although the exaction of heavy charges for visés by local authorities may be the subject of international complaint.² Unequal and discriminating charges against citizens of certain countries will similarly evoke a diplomatic protest.³

The request conveyed by the passport is expected to receive recognition by foreign governments and their officials, subject of course to their local laws. Where conditions for the recognition of its validity are imposed, they usually take the form of a diplomatic or consular visé, an endorsement on the passport denoting that it has been examined and is authentic and that the bearer may be permitted to proceed on his journey. "Sometimes it is required that the visé be affixed in the country where the passport is issued, by a diplomatic or consular officer of the government requiring it; sometimes simply by such officer anywhere; sometimes at the frontier of the country to which admission is sought. It may even be required from a dip-

For. Rel., 1888, I, 542, quoted in Moore's Dig. III, 884. The only qualification of the rule, provided the father was a citizen at birth of the child, operates to enable the child to obtain a passport, at majority, to enable him to return to the U. S. to take up the duties of citizenship.

¹ Mr. Blaine, Sec'y of State, to Mr. Phelps, min. to Germany, Nov. 11, 1891, For. Rel., 1891, 521.

² Mr. Sherman, Sec'y of State, to Mr. Powell, min. to Haiti, Oct. 23, 1897, For. Rel., 1897, p. 343, and other citations in Moore's Dig. III, 861; Mr. Frelinghuysen, Sec'y of State, to Mr. Foster, min. to Spain, March 12, 1884, Moore's Dig. III, 999.

³ Mr. Bayard, Sec'y of State, to Mr. Muruaga, Spanish min., May 19, 1886, and other citations in Moore's Dig. III, 999.

lomatic or consular officer of the government which issued the passport." ¹

Owing to the stringent supervision of aliens necessitated by the state of war existing in Europe, many of the European countries, particularly Germany, increased to a considerable degree the requirements for the visé of foreign passports. For informative purposes, the Department of State issued a circular on February 8, 1915, concerning the latest requirements of various European countries in this respect:

"The Department understands that it is *necessary* to have passports visaed for entry into the following countries, by diplomatic or consular officers thereof: Russia, Turkey, Italy, Germany, Roumania, and Servia.

"Passports of American citizens going to Russia should be visaed by a Russian consular officer, preferably in the United States, at San Francisco, Chicago, or New York City. One who desires to have the visa of his passport for Russia cover a period longer than three months should make a special request to that effect.

"Passports to be used in Turkey should be visaed by a Turkish consular officer, either in the United States, at San Francisco, Chicago, Boston, or New York City, or at a Turkish consulate abroad.

"Passports to be used in Italy should be visaed by an Italian consular officer, preferably in the United States.

"Passports to be used in Germany should be visaed by a German diplomatic or consular officer, preferably in the United States.

"Passports to be used in Servia should be visaed by the Servian Consul-General in New York City, or by a diplomatic or consular officer of Servia in some foreign country.

"Passports to be used in Roumania should be visaed by a Roumanian diplomatic or consular officer in some foreign country, there being no diplomatic or consular officers of Roumania in the United States.

"The Department understands that it is *advisable* to have passports visaed by consular officers of the following countries, for use therein: Austria-Hungary, Denmark and France; and that it is advisable to have them visaed for use in Spain by the Spanish Ambassador in Washington or a Spanish consul in New York City, New Orleans,

¹ The American passport, 5; Moore's Dig. III, 994.

or San Francisco. It is deemed advisable for persons going to Bulgaria to have their passports visaed by the Consul-General of Bulgaria in New York City, or by a diplomatic or consular officer of Bulgaria in some foreign country.

"The Department is informed that persons entering British territory are required to bear passports, but that it is not necessary that they should be visaed.

"American citizens who expect to visit countries of Europe other than those named above should inquire of diplomatic or consular officers thereof concerning the necessity or advisability of having their passports visaed.

"The Department of State does not act as the intermediary in procuring visas. Application should be made by the holder of the passport directly to the diplomatic or consular officer."

In a circular notice of November 17, 1914, American citizens were advised "to avoid visiting unnecessarily countries which are at war, and particularly to avoid, if possible, passing through or from a belligerent country to a country which is at war therewith;" and that "American citizens who find it necessary to visit such countries should as a matter of precaution and in order to avoid detention, provide themselves with letters or other documents, in addition to their passports, showing definitely the objects of their visits." France, after April 1, 1915, required foreigners to exhibit certified copies of the applications upon which passports were issued to them, whereupon the Department made arrangements to place its seal upon a copy of the application returnable to the applicant. French consuls were authorized to issue passports to foreigners, not enemy subjects or persons possessing dual nationality, who desired to enter France.

As will have been noted, these requirements of foreign law differ from country to country and are not generally objected to if considered reasonable. The practice of Russian consuls in the United States to interrogate American citizens contemplating visits to Russia as to their race and religious faith and denying to certain classes of Jews the authentication of the passport, provoked the United States to remonstrate against what it conceived to be the invasion of its territorial jurisdiction and the infringement of the treaty rights of its

citizens. The protests continued through several administrations, culminating finally, during the administration of President Taft, in the abrogation of the Russian treaty of Dec. 18, 1832.¹

The local legalization of documents is required, either on admission or during sojourn, for police supervision of foreign residents. While the United States has never objected to the provisions of local law abroad by which its consuls or diplomatic officers are required to verify the passport or endorse a suitable statement on it, they have objected to foreign officials sending the passport back to the Department of State for authentication of the citizenship of the bearer. The form in which the consular authentication is made, either on the passport itself or in the form of a separate certificate based on the passport, has also provoked some discussion with various countries whose local requirements were considered in excess of those with which our representatives abroad were authorized to comply. Discussions of this character took place with the Argentine Republic,² with Uruguay,³ with China,⁴ and with Spain in Cuba.⁵ By diplomatic negotiation these requirements of local law, which are particularly stringent in countries like Turkey, Russia and China, have been attempted to be adjusted and reconciled with the practice and policy of the United States.⁶

¹ Quotations from President's messages and diplomatic notes in Moore's Dig. III, 996-997; Moore's Dig. II, 8-12. See House Joint Resolution 166, and Senate J. R. 60 and hearings thereon in 62nd Congress, 2nd session, when the treaty was abrogated, on the ground that Russia had violated article I; also H. Report 203, same session, and S. Doc. 161, Message transmitting notice of Sec'y of State to American Ambassador at St. Petersburg. (See also an address by Louis Marshall, Russia and the American passport, printed as Senate Doc. 839, 61st Cong., 3rd sess., 10 p.) See, however, article by Gaillard Hunt in Harper's Weekly, Jan. 6, 1912, p. 21, to the effect that Russia's attitude and practice toward American Jews were not in violation of the treaty.

France declined to abrogate a somewhat similar treaty with Russia of April 1, 1874, Foreign Minister Poincaré taking the ground that Russian public law was not abrogated or derogated from by the treaty. 40 Clunet (1913), 124-128.

² Moore's Dig. III, 1007.

³ *Ibid.*, 1009.

⁴ *Ibid.*, 1010-1015.

⁵ *Ibid.*, 859 *et seq.*

⁶ The requirements of various countries and diplomatic notes in connection therewith are discussed in Moore's Dig. III, 1003 *et seq.*; 994 *et seq.* For the "passport regulations of foreign countries" see a publication issued under that title by the

It is admitted that for police purposes and as a condition for continued residence, a foreign country may satisfy itself as to the authenticity of the citizenship and peaceful nature of the business of a foreign resident. The provisions of the regulations of 1907 by which the consular certificate of registration may be issued locally¹ and by which, in case of necessity, emergency passports may be issued, are intended to satisfy these requirements of local law and to bring about greater uniformity in the practice.

In order to summarize the requirements for the issue of a passport, and particularly the information and proof which the applicant must present, it has seemed desirable to print in full the rules of January 12, 1915, governing the granting and issuing of passports, and the circular instruction of December 21, 1914, to diplomatic and consular officers, concerning the new passport regulations, based, however, upon the passport rules issued November 13, 1914, rather than the latest rules of January 12, 1915.

§ 219. Latest Passport Rules.

1. **AUTHORITY TO ISSUE.**—Section 4075 of the Revised Statutes of the United States, as amended by the Act of Congress approved June 14, 1902, provides that "the Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and by such chief or other executive officer of the insular possessions of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States." The following rules are accordingly prescribed for the granting and issuing of passports in the United States.

2. **BY WHOM ISSUED AND REFUSAL TO ISSUE.**—No one but the Secretary of State may grant and issue passports in the United States (Revised Statutes, Sections 4075, 4078) and he is empowered to refuse them in his discretion.

Passports are not issued by American diplomatic and consular officers abroad, except in cases of emergency; and a citizen who is abroad and desires to procure a passport must apply therefor through the nearest diplomatic or consular officer to the Secretary of State.

Dept. of State in 1897. (House Doc. 335, 54th Cong., 2nd sess.) References to legislation in various countries and articles on the subject of passports and the requirements of local law, will be found in Clunet's *Tables générales*, 1904, IV, 394-396; I, p. 814, Nos. 6979-7064, and p. 986, Nos. 9251-9270. New local regulations concerning passports and the right of sojourn are frequently printed in the section "*Faits et Informations*" in the current numbers of Clunet.

¹ Circular of April 19, 1907, For. Rel., 1907, p. 6.

Applications for passports by persons in Porto Rico or the Philippines should be made to the Chief Executives of those Islands. The evidence required of such applicants is similar to that required of applicants in the United States.

3. FEE.—By Act of Congress approved March 23, 1888, a fee of one dollar is required to be collected for every citizen's passport. That amount in currency or postal money order should accompany each application made by a citizen of the United States. Orders should be made payable to the Disbursing Clerk of the Department of State. Drafts or checks will not be accepted.

4. APPLICATIONS.—A person who is entitled to receive a passport, if within the United States, must submit a written application, in the form of an affidavit, to the Secretary of State. The application should be made by the person to whom the passport is to be issued and signed by him, as it is not proper for one person to apply for another.

The affidavit must be made before a clerk of a Federal or State Court within the jurisdiction of which the applicant or his witness resides, and the seal of the court must be affixed.

If the applicant signs by mark, two attesting witnesses to his signature are required. The applicant is required to state the date and place of his birth, his occupation, the place of his permanent residence, and within what length of time he will return to the United States with the purpose of residing and performing the duties of citizenship. *He is also required to state the names of the foreign countries which he expects to visit, and the objects of his visits thereto. The latter statement should be brief and general in form, thus: "commercial business";¹ "to attend to the settlement of an estate"; "to bring wife and children to this country."*

The applicant must take the oath of allegiance to the United States.

The application must be accompanied by a description of the person applying, and should state the following particulars, viz: Age, ———; stature, ——— feet, ——— inches (English measure); forehead, ———; eyes, ———; nose, ———; mouth, ———; chin, ———; hair, ———; complexion, ———; face, ———; special identifying marks, if any (scars, birthmarks, etc.)

The application must also be accompanied by duplicate photographs of the applicant, on thin paper, unmounted, and not larger in size than three by three inches. One must be attached to the back of the application by the clerk of court before whom it is made, with an impression of the seal of the court so placed as to cover part of the photograph but not the features, and the other sent loose, to be attached to the passport by the Department. Photographs on cardboard or postcards will not be accepted.

The application must be supported by an affidavit from at least one credible witness that the applicant is the person he represents himself to be, and that the facts stated in the application are true to the best of the witness' knowledge and belief. This affidavit must be made before the clerk of court before whom the application is executed and the witness must be an American citizen, who resides within the jurisdiction of the court. The applicant or his witness must be known to the clerk of court before whom the application is executed, or must be able to satisfy such officer as to his identity and the bona fides of the application.

¹ An applicant who states that he is going abroad on commercial business should submit with his application a letter from the head of the concern which he represents.

5. **NATIVE CITIZENS.**—An application containing the information indicated by rule 4 will be sufficient evidence in the case of a native citizen; *except that a person born in the United States in a place where births are recorded will be expected to submit a birth certificate with his application.*

A person of the Chinese race, alleging birth in the United States, must obtain from the Commissioner of Immigration or Chinese Inspector in Charge *at the port through which he proposes to leave the country* a certificate upon his application, under the seal of such officer, showing that there has been granted to him by the latter a return certificate in accordance with rule 16 of the Chinese Regulations of the Department of Labor. For this purpose special blank forms of application for passports are provided.

Passports issued by the Department of State or its diplomatic or consular representatives are intended for identification and protection in foreign countries, and not to facilitate entry into the United States, immigration being under the supervision of the Department of Labor.

6. **A PERSON BORN ABROAD WHOSE FATHER WAS A NATIVE CITIZEN OF THE UNITED STATES.**—In addition to the statements required by rule 4, his application must show that his father was born in the United States, resided therein, and was a citizen at the time of the applicant's birth. The Department may require that this affidavit be supported by that of one other citizen acquainted with the facts.

7. **NATURALIZED CITIZENS.**—In addition to the statements required by rule 4, a naturalized citizen must transmit his certificate of naturalization, or a duly certified copy of the court record thereof, with his application. It will be returned to him after inspection. He must state in his affidavit when and from what port he emigrated to this country, what ship he sailed on, where he has lived since his arrival in the United States, when and before what court he was naturalized, and that he is the identical person described in the certificate of naturalization. The signature to the application should conform in orthography to the applicant's name as written in his certificate of naturalization, or an explanation of the difference should be submitted.

8. **WOMAN'S APPLICATION.**—If she is unmarried, in addition to the statements required by rule 4, she should state that she has never been married. If she is the wife or widow of a native citizen of the United States the fact should be made to appear in her application, which should be made according to the form prescribed for a native citizen, whether she was born in this country or abroad. If she is the wife or widow of a naturalized citizen, in addition to the statements required by rule 4, she must transmit for inspection her husband's certificate of naturalization or a certified copy of the court record thereof, must state that she is the wife (or widow) of the person described therein, and must set forth the facts of his birth, emigration, naturalization, and residence, as required in the rules governing the application of a naturalized citizen. She should sign her own Christian name with the family name of her husband: (Thus, Mary Doe; not Mrs. John Doe.)

A married woman's citizenship follows that of her husband. It is essential, therefore, that a woman's marital relations be indicated in her application for a passport, and that in the case of a married woman her husband's citizenship be established.

9. **THE CHILD OF A NATURALIZED CITIZEN CLAIMING CITIZENSHIP THROUGH THE NATURALIZATION OF THE PARENT.**—In addition to the statements required by rule 4, the applicant must state that he or she is the son or daughter, as the case may be,

of the person described in the certificate of naturalization, which must be submitted for inspection, and must set forth the facts of emigration, naturalization and residence, as required in the rules governing the application of a naturalized citizen.

10. A RESIDENT OF AN INSULAR POSSESSION OF THE UNITED STATES WHO OWES ALLEGIANCE TO THE UNITED STATES.—In addition to the statements required by rule 4, he must state that he owes allegiance to the United States, and that he does not acknowledge allegiance to any other government, and must submit affidavits from at least two credible witnesses having good means of knowledge in substantiation of his statements of birth, residence and loyalty. No fee is required for the issuance by the Department of an insular passport.

11. EXPIRATION AND RENEWAL OF PASSPORT.—*A passport expires six months from the date of its issuance.* A new one will be issued upon a new application, accompanied by the old passport, and, if the applicant be a naturalized citizen, the old passport will be accepted in lieu of a certificate of naturalization, if the application upon which it was issued is found to contain sufficient information as to the naturalization of the applicant. Passports are not renewed by the Department, but a person abroad holding a passport issued by the Department may have it renewed for a period of six months upon presenting it to a diplomatic or principal consular officer of the United States, when it is about to expire, with a sworn statement of the names of the countries which he expects to visit and the objects of his visits thereto. No passport shall be renewed more than twice.

12. WIFE, MINOR CHILDREN, AND SERVANTS.—When the applicant is accompanied by his wife, minor children, and maid-servant, who is a citizen of the United States, it will be sufficient to state the fact, giving their names in full, the dates and places of their births, and the allegiance of the servant, when one passport will suffice for all. For a man-servant or any other person in the party a separate passport will be required. A woman's passport may include her minor children and maid-servant under the above-named conditions.

(The term "maid-servant" does not include a governess, tutor, pupil, companion, or person holding like relation to the applicant for a passport.)

13. TITLES.—Professional and other titles will not be inserted in passports.

14. BLANK FORMS OF APPLICATION.—They will be furnished by the Department free of charge to persons who desire to apply for passports. Supplies of blank applications are also furnished by the Department to clerks of courts.

15. ADDRESS.—Communications should be addressed to the Department of State, Bureau of Citizenship, and each communication should give the post-office address of the person to whom the answer is to be directed.

16. ADDITIONAL REGULATION.—The Secretary of State is authorized to make regulations on the subject of issuing and granting passports additional to these rules and not inconsistent with them.¹

To become effective February 1, 1915.

WOODROW WILSON.

THE WHITE HOUSE,
12 January, 1915.

¹ The italics indicate the provisions which constitute amendments of previously issued passport rules.

§ 220. Circular Instruction Concerning New Passport Regulations.

Washington, December 21, 1914.

To the

American Diplomatic and Consular Officers.

GENTLEMEN:

In confirmation of the Department's recent telegraphic instructions to diplomatic and certain consular officers concerning the preparation of applications for Departmental and emergency passports, and the issuance of the latter, the following instructions are given for your guidance. These instructions are prescribed in pursuance of the passport regulations signed by the President November 13, 1914.

EVIDENCE OF CITIZENSHIP AND IDENTIFICATION

Conditions precedent to the granting of a passport are, under the law and rules prescribed by authority of the law, that the citizenship of the applicant, his identity, and, as a rule, his permanent residence in the United States and definite intention to return to it, with the purpose of performing the duties of citizenship, shall satisfactorily be established. (See circular instruction of July 26, 1910, entitled "Protection of Native Americans Residing Abroad," and circular instruction of April 19, 1907, entitled "Expatriation," as amended by circular instruction of May 14, 1908.) Exceptions to the latter condition may be made in some cases by special direction of the Department, particularly in cases of persons residing abroad as representatives of American trade and commerce and as missionaries of American church organizations.

The applicant should, if possible, be introduced by a reputable person known to the office which takes the application, or, if this is impossible, he should be required to identify himself by satisfactory documentary evidence. In doubtful cases references to persons in this country should be required, so that the Department may make proper enquiries concerning the applicants.

Emergency passports and consular registration certificates should not be accepted as conclusive evidence of citizenship. In this relation it may be observed that in some cases such documents have been issued hastily and without proper examination into the citizenship and identity of the applicants, especially during the period immediately following the outbreak of the present European war.

NATIVE AMERICAN CITIZENS

In taking the passport application of a person alleging native citizenship, you should require the applicant to submit a birth certificate, if possible, or letters or other documents satisfactorily establishing his citizenship. The nature of the evidence submitted to you must be stated in the passport application.

NATURALIZED AMERICAN CITIZENS

A person claiming citizenship by naturalization *must be required to submit his certificate of naturalization or a certified copy of the court record thereof, or an old passport issued by the Department, and his passport application must state the name of the court*

in which he obtained naturalization and the date thereof. If any such person is unable to submit such documentary evidence of his naturalization, you should inform the Department of the name of the court in which he alleges that he obtained naturalization and the date thereof, so that the Department may take steps to verify his allegation.

PHOTOGRAPHS OF APPLICANTS

Each applicant for a passport must submit triplicate unmounted photographs of himself on thin paper, not larger than three by three inches in size, one to be attached to each of his applications by the officer before whom they are executed, and the third to be attached to the passport and to be partly stamped with an impression of the seal of the issuing office.

An application forwarded to the Department for a regular passport must necessarily be accompanied by a loose photograph of the applicant in addition to the one attached to the application, so that the former may be attached to the passport, with an impression of the Department's seal.

NAMES OF COUNTRIES APPLICANTS EXPECT TO VISIT AND OBJECTS OF VISITS

Each application must state the names of the countries which the applicant expects to visit and the object of the visit. The statement concerning the object of the applicant's visit should be general in form, thus: "commercial business," "health," "study," "visiting relatives," "recreation," "settling an estate," etc.

With reference to the statement "commercial business," you are instructed that no mention should be made of the exact nature of the business in which the applicant is engaged; that is, it would be improper to state the name or names of the concerns which the applicant represents or the nature of the goods which he expects to purchase or sell. (The form of the statement written upon the faces of passports is quoted below.)

ISSUANCE OF EMERGENCY PASSPORTS

Diplomatic and consular officers authorized to issue emergency passports should exercise the greatest caution in doing so, and should require of each applicant unquestionable evidence of his citizenship and identity. A photograph of the applicant should be attached to the passport (in the upper left hand corner) with an impression of the seal of the issuing office, which should be so placed as partly to cover one side but not the features. The following statement should be made upon the face of the passport (in the upper right hand corner):

"The person to whom this passport is issued has declared under oath that he desires it for use in visiting the countries hereinafter named, for the following objects:

_____ (Name of country.)	_____ (Object of visit.)
_____ (Name of country.)	_____ (Object of visit.)
_____ (Name of country.)	_____ (Object of visit.)

"This passport is not valid for use in other countries except for necessary transit to or from the countries named."

Rubber stamps should be used in making the above form of statement.

When an American citizen, sojourning abroad and holding a passport limited for use in certain countries, finds it necessary to visit another country, not mentioned therein, he may turn in the passport which he holds at the American Embassy, Legation, or Consulate authorized to issue emergency passports in the country where he is sojourning, and obtain an emergency passport limited for use in the particular trip which he has in view. Upon his return, he may surrender such emergency passport and recover the passport which he previously held. It is not proper for one person to hold two valid passports.

In the issuance of emergency passports under the conditions just mentioned the same rules should be observed as in the issuance of emergency passports in general.

AMENDMENT OF PASSPORTS ISSUED PRIOR TO THESE REGULATIONS

American citizens holding valid passports issued prior to these regulations should be notified, through the press or otherwise, to present themselves to a diplomatic or consular office within two weeks, if possible, so that their passports may be amended to conform with the new passport regulations. The Department has reason to believe that there are some persons abroad holding emergency, and perhaps Departmental, passports to which they are not entitled. Therefore, when a passport is presented to you for amendment in accordance with the new regulations, you should examine the holder carefully and require him to submit the same evidence of his citizenship and identity which would be required of him were he making an original application for a passport. If any holder of a passport appears to be not entitled to it, you should retain the passport, investigate the case, and inform the Department fully of the pertinent facts and your conclusions.

All holders of emergency passports who expect to continue their residence abroad for a considerable period, should be notified to apply forthwith for regular Departmental passports.

W. J. BRYAN.

On Feb. 8, 1915 the Department issued new circular instructions to diplomatic and consular officers advising them of the changes effected by the passport regulations of January 12, 1915, particularly the six-months' duration of the passport, with possibility of two renewals, and empowering them to amend the statement in the passport concerning the countries to be visited and the objects of the visits. The power to thus amend regular passports dispenses to a considerable degree with the necessity for issuing emergency passports, as authorized in the general instructions of December 21, 1914.

OTHER FORMS OF EVIDENCING CITIZENSHIP

§ 221. Certificate of Naturalization.

The certificate of naturalization as an evidence of citizenship emanates from the judicial department of the government, and is not

used so freely as the passport as an international warrant of citizenship or protection. It is, when properly issued, the best evidence of naturalization, and its presentation is the customary method by which naturalized citizens before international commissions establish their citizenship. While occasionally presented to foreign governments as an evidence of American citizenship, it is most frequently used as evidence before the Department of State or before American diplomatic and consular officers as a title to a passport or to diplomatic protection or registration. A naturalized citizen applying for a passport must present his certificate of naturalization, or a duly certified copy of the court record thereof. Under an amendment of paragraph 154 of the Instructions to Diplomatic Officers, diplomatic officers may receive an old passport in lieu of a certificate of naturalization as *prima facie* evidence that the applicant's citizenship was established, and issue thereon an emergency passport. This applies also to persons who claim citizenship through the naturalization of the parent. The extent to which a certificate of naturalization is binding upon municipal and international courts and upon the Department of State and foreign governments as a proof of citizenship and the circumstances under which it may be impeached will be discussed presently.¹

§ 222. Certificate of Registration.

Certificates of registration are issued by consuls to American citizens who register at the consulates in conformity with paragraph 172 of the Consular Regulations, as amended by the Executive Order of April 8, 1907.² Following the practice of several European countries, notably Belgium, Spain and Portugal, the Department of State has encouraged the registration of American citizens resident abroad by providing a registration book in each consulate. Such registration has important legal effects under the statute of the United States by which American women abroad, the widows or divorcees of aliens, and foreign-born women, the widows or divorcees of American citizens, may resume or retain, as the case may be, their American citizen-

¹ *Infra*, § 224 *et seq.*

² Circular, April 19, 1907, Registration of American Citizens, For. Rel., 1907, I, 6.

ship by registration in an American consulate. So, likewise, children born abroad who are citizens under § 1993 of the Revised Statutes must, upon reaching the age of eighteen, in order to receive the protection of this government, record at a consulate their intention to become residents and remain citizens of the United States.¹ The practical effects of consular registration, to which all American citizens resident abroad are invited, are hardly less important. Registration operates as a definite avowal or election of citizenship and is an important factor in overcoming the presumption of expatriation. Besides, it facilitates and expedites protection abroad in case of need, inasmuch as the identity and citizenship of the person desiring protection are at once established and made a matter of record.

The same general principles govern applications for registry which govern applications for passports. The applicant must furnish to the consul the same proof of citizenship as would be required by the Department of State for the issuance of a passport.² Upon satisfactory registration, the consul is authorized to issue without charge³ a certificate of registration for use with the authorities of the place where the person registered is residing. The certificates are good for one year only, and may be renewed annually, provided it is clearly shown that the residence abroad has not assumed a permanent character.

The certificate of registration, while serving the important international purpose of establishing the identity and citizenship of the entitled holder, is issued rather as a measure of supervision or control by the United States over its citizens abroad, particularly in extraterritorial countries, and as an aid to its protective functions.

¹ Sections 3, 4 and 6 of the Act of March 2, 1907, Circulars, April 19, 1907, Registration of women who desire to resume or retain American citizenship, and Children of citizens born abroad, For. Rel., 1907, I, 10, 9.

² See the rules prescribed by the Dept. of State in circular of November 30, 1907, and March 2, 1908, as to Applications for registration. See also circular of June 21, 1909.

³ Circular March 25, 1908. The charge of a small fee is now contemplated by the Department.

IMPEACHMENT OF CITIZENSHIP

§ 223. Who may Impeach.

The conclusiveness of the ordinary evidences of citizenship, the passport and the certificate of naturalization, has been the subject of much diplomatic correspondence during the last fifty years. This government has uniformly insisted that the documents it issues as certificates of citizenship shall be considered as *prima facie* evidence of lawful citizenship. While admitting the possibility of foreign authorities traversing the conclusively evidentiary character of the passport or certificate of naturalization, by showing fraud or illegality, the United States, as has been said, has reserved to itself the exclusive right to determine the ultimate validity of these documents and of the citizenship of the persons to whom they are issued.

On several occasions the attempts of foreign governments to impeach the validity of a passport duly issued by the Department of State have called forth emphatic protests from American secretaries of State.¹ Diplomatic difficulties with Mexico, Austria-Hungary and Russia have made it clear that the United States will not admit the right either of administrative or judicial officers of those countries to pass upon the validity of passports or certificates of naturalization issued by the United States. These documents may be questioned on the ground that they have been fraudulently obtained or are fraudulently held, but even then the determination of the validity of the passport is within the competency alone of the Department of State and not of the local authorities abroad. The assumption by such local authorities of the right to ignore the evidence of the passport and to ascertain by an independent municipal investigation the citizenship of an alien, an American citizen, was declared by Secretary of State Gresham to be "incompatible with the universally admitted doctrine that a state is the sole and ultimate judge of the citizenship of its own dependents, and is competent to certify to the fact." He added:

"It is neither incumbent upon the bearer to prove his citizenship by

¹ See the various notes of Secretaries Marcy, Fish, Evarts, Foster, Gresham and Olney, quoted in Moore's Dig. III, 985 *et seq.*

extraneous evidence at the will of the country of his sojourn; nor upon the certifying government to support its official attestation of the fact of the citizenship by collateral proof under the municipal requirements of another country Should the Austro-Hungarian authorities have reason to believe that they [passports] are fraudulently held by others than the persons to whom they were lawfully issued or that the holders have obtained naturalization in fraud of the laws of the United States, or claim privileges of citizenship not granted by the treaty of naturalization between the two countries, the facts should at once be brought to the notice of the Government of the United States through its accredited envoy in Austria-Hungary.”¹

The naturalization treaties with some of the German states make five years' residence as well as naturalization conditions precedent to a recognition of a change of allegiance. Inasmuch as the passport of a naturalized citizen does not disclose the statute under which he was naturalized—which may not be predicated upon a five years' residence, *e. g.*, in the case of minors, honorably discharged soldiers, seamen, etc.—the allegation of a failure to comply with the requirement of five years' residence must be heard as an objection to the conclusively evidentiary character of the passport, and in the absence of disrespect to the passport as *prima facie* evidence of citizenship, the competency of a German court to conduct an independent investigation upon the question of five years' residence cannot, it would seem, be contested.²

The United States has always insisted that it alone was competent to pass upon the question as to whether a passport was fraudulently obtained. If foreign governments could pass upon the question of fraud in obtaining a passport, they would in effect pass upon the legality of the act of naturalization itself, an assumption which the United States has always vigorously contested.³

The passport must be accepted as *prima facie* proof of citizenship

¹ Mr. Gresham, Sec'y of State, to Mr. Tripp, min. to Austria-Hungary, Sept. 4, 1893, For. Rel., 1893, 23-24, quoted in Moore's Dig. III, 988-989. The Austrian foreign office fully conceded the principle contended for by Mr. Gresham.

² Mr. Olney, Sec'y of State, to Mr. Jackson, chargé at Berlin, Feb. 13, 1896, For. Rel., 1895, 520-523 (*In re* claim by Würtemberg authorities of right to require other evidence of citizenship than passports). Extracts quoted in Moroe's Dig. III, 993-994.

³ Mr. Hay, Sec'y of State, to Mr. Harris, min. to Austria-Hungary, Nov. 7, 1899, For. Rel., 1899, 78, Passport of John Wilson. Quoted in Moore's Dig. III, 1001.

by the consular and diplomatic officers of the United States,¹ although upon an application for the issuance of a passport, the diplomatic officer can question the validity of a naturalization certificate and compliance with its essential conditions.²

What has been said above regarding the impeachability of the passport applies equally to the certificate of naturalization, on which, in the case of naturalized citizens, it is practically always issued. Thus, the United States has uniformly contested any assumption of right by the administrative or judicial authorities of foreign countries to pass upon the legality or validity of a certificate of naturalization, that being, so it has been insisted, the exclusive function of the appropriate authorities of the United States.³

§ 224. Nature of Certificate of Naturalization. Its Character as Res Adjudicata.

A certificate of naturalization is not only an evidence of citizenship, but, emanating from the judicial department of the government, it is also the evidence of a judgment.⁴ Out of this fact has arisen some confusion as to the sacredness of the certificate of naturalization,⁵ its character as *res adjudicata*, and the extent to which it is bind-

¹ Mr. Hay, Sec'y of State, to Mr. Hardy, min. to Switzerland, April 23, 1901, Application of Carl F. Kupfer, For. Rel., 1901, 508-509.

² Mr. Leishman to Mr. Hay, May 17, 1901, and Mr. Hill, Act'g Sec'y of State, to Mr. Leishman, June 14, 1901, For. Rel., 1901, 519-520.

³ The Benich case in Austria, Mr. Gresham, Sec'y of State, to Mr. Tripp, Sept. 4, 1893, For. Rel., 1893, 23-25. See also For. Rel., 1894, 36-46, For. Rel., 1895, 514-523, For. Rel., 1895, 8-12, 13-20; Sec'y Hay to Mr. Harris, Nov. 7, 1899, For. Rel., 1899, 78, Moore's Dig. III, § 424. See also the Beaufremont decision in Belgium, 9 Clunet (1882), 364, Von Bar (Gillespie's trans.), 158 *et seq.*, and Morse, Citizenship, 92.

⁴ In reality the court acts as an administrative body, the proceedings being in the nature of non-contentious jurisdiction. (See Pitney, J., in *Johannessen v. U. S.*, 225 U. S. 227, 237.) It is in the nature of a judgment *in rem*, though the application is submitted with *ex parte* proofs. The Government rarely appears, although by § 11 of the Act of June 29, 1906, the Government is given the right to appear, and to cross-examine the petitioner and witnesses and produce evidence in opposition to a grant of naturalization. See also 14 Opin. Atty. Gen. 509, and the exhaustive opinion of the late Spanish Treaty Cl. Com. in *Ruiz v. U. S.*, printed in Van Dyne, Naturalization, 151.

⁵ Attorney-General Akerman, in 13 Opin. Atty. Gen. 376, erroneously held that it was a judgment binding only on parties and their privies; hence that the U. S. was

ing on municipal courts, on international courts, and on the executive branch of the government.

§ 225. Conclusiveness upon Municipal Courts.

Before municipal courts of the United States a decree or order of naturalization cannot be impeached collaterally.¹ It is presumed to be conclusive, and complete evidence of its own validity. Yet in the matter of the collateral attack of judgments, the following distinction has been drawn: they may be impeached by facts involving fraud or collusion which were not before the court or involved in the issue or matter upon which the judgment was rendered, but they may not be impeached for matters which were necessarily before the court and passed upon.² If, however, the certificate is void on its face, *e. g.*, if issued to a Japanese³ or Chinese⁴ subject, the certificate of naturalization may be treated as void in any proceedings.

Certificates of naturalization, fraudulently acquired or held, may, as will be seen, be cancelled in direct proceedings to that end. The federal statutes also provide for the criminal prosecution of false personation, false swearing and forgery in naturalization proceedings, as well as of the uttering, selling and use of false naturalization papers.⁵

It has been held generally that only the United States can proceed judicially to set aside or cancel a certificate of naturalization,⁶ although it was not definitely determined before the Act of June 29, 1906, which officers might bring such an action. Section 15 of the Act of June 29,

not concluded by a fraudulent certificate of naturalization. The true ground is rather that a judgment *in rem* may be attacked for fraud, or that, being an *ex parte* proceeding, the U. S. is not concluded by the certificate granted. *Johannessen v. U. S.*, 225 U. S. 227, 237. See *Morse, Citizenship*, § 191.

¹ Moore's Dig. III, § 422 and decisions there cited. *Van Dyne, Naturalization*, 134-141; H. Doc. 326, 59th Cong., 2d sess., 130-133.

² *U. S. v. The Acorn*, 2 Abbott's U. S. Rep. 434, 445.

³ *In re Yamashita*, 30 Wash. 234, 70 Pac. Rep. 482.

⁴ *In re Gee Hop*, 71 Fed. 274; *In re Hong Yen Chang*, 84 Cal. 163; 21 Opin. Atty. Gen. 581; Moore's Dig. III, 501.

⁵ Moore's Dig. III, 499.

⁶ *Pintsch Compressing Co. v. Bergin*, 84 Fed. 140; *U. S. v. Norsch*, 42 Fed. 417; *U. S. v. Gleason*, 78 Fed. 396, is doubtful law. See other cases cited in H. Doc. 326, 59th Cong., 2d sess., 132.

1906, makes specific provision for the bringing of such suits by the Department of Justice.¹ According to a recent decision, it would seem that a State cannot impeach naturalization.² It is established that private parties, exclusive of the naturalized person himself, may not impeach the record of naturalization.³ The judgment may be impeached on the same grounds that would render any judgment of a court invalid. The usual ground is fraud or illegality in the procurement of the naturalization.⁴

In European countries, municipal courts frequently have to decide upon the effect to be given to a foreign judgment of naturalization, and the general rule as to judgments appears to be followed. For example, if the foreign court was without jurisdiction of person or subject-matter, recognition of the judgment will be refused. Similarly, if the foreign naturalization is contrary to the law or public policy of the jurisdictional state, the foreign judgment will be denied validity.⁵ In the absence of treaty, the original home state of the naturalized person may not admit the validity of or give effect to his foreign naturalization, if obtained in violation of its law. This is quite different from directly declaring a foreign naturalization null, which would be an invasion of the sovereign rights of a foreign state. It would seem true, also, as in the case of all foreign judgments, that fraud in its procurement may be set up as a ground of impeachment, and the local court will refuse to recognize and enforce a judgment of naturalization obtained by fraud.⁶ This also is the standpoint assumed by international tribunals in passing upon the evidentiary character of a certificate of naturalization.

¹ 34 Stat. L. 596. The Act is set out in Van Dyne, *Naturalization*, 417 *et seq.* and the proceedings under § 15 are discussed at pp. 34-36, 135-141. See *U. S. v. Nesbit*, 168 Fed. 1005; *U. S. v. Simon*, 170 Fed. 680; *U. S. v. Meyer*, 170 Fed. 983; *U. S. v. Mansour*, 170 Fed. 671; *U. S. v. Luria*, 184 Fed. 643, 231 U. S. 9; *U. S. v. Spohrer*, 175 Fed. 440; *Johannessen v. U. S.*, 225 U. S. 227.

Peterson v. State (1905), 89 S. W. 81.

Cases quoted and cited in H. Doc. 326, *op. cit.*, 132-133.

² H. Doc. 326, 59th Cong., 2d sess., 133; Act of June 29, 1906, § 15, *infra*, § 228 *et seq.*

³ Bar, 163-165.

⁴ Story, *Conflict of laws*, 608; *Ruiz v. U. S.*, No. 112, Span. Treaty Cl. Com., Decision printed in Van Dyne, *Naturalization*, 167-168.

§ 226. The Practice of International Tribunals of Arbitration.

Whatever the conclusive force of judgments of naturalization under municipal laws of the country where granted, international tribunals have often asserted and exercised the right to determine for themselves the citizenship of claimants from all the facts presented.¹

These international tribunals, with practically unbroken uniformity, have held that they were not conclusively bound by a certificate of naturalization, but, on an allegation of fraud, could go behind the certificate to examine the antecedent facts on which it was granted. Such a certificate has been held to be *prima facie* evidence of citizenship,² and in the absence of proof of fraud, it has been accepted as conclusive evidence of its own validity.³ A mere error or irregularity or honest failure to comply fully with the laws of the United States has not been generally deemed a sufficient ground to impeach the evidentiary force of the certificate of naturalization, but some intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the naturalization has usually been required to effect this end. Nevertheless, in some cases, *e. g.*, in the Medina case before the United States-Costa Rican commission of 1860 and in the Flutie case before the United States-Venezuelan commission of 1903, fraud was not considered essential to denial of a claim of citizenship, but misrepresentation or proved non-compliance with the conditions for naturalization was considered sufficient to overcome the presumptive evidence of the certificate. Some exceedingly able opinions on this question have been written, and particular merit is found in the decisions of Umpire Bertinatti in the case of Medina before the United States-Costa Rican Commission of 1860⁴ and of

¹ Flutie (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 38, 42, citing Medina (U. S.) *v.* Costa Rica, Moore's Arb. 2587; Laurent (Gt. Brit.) *v.* U. S., *ibid.* 2671; Lizardi (U. S.) *v.* Mexico, *ibid.* 2589; Kuhnagel (France) *v.* U. S., *ibid.* 2647; Angarica (U. S.) *v.* Spain, *ibid.* 2621; Criado (U. S.) *v.* Spain, *ibid.* 2624.

² Delgado (U. S.) *v.* Spain, Feb. 12, 1871, Moore's Arb. 2590-2592; Sprotto (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 2717.

³ Delgado (U. S.) *v.* Spain, Feb. 12, 1871, *ibid.* 2590; Madan (U. S.) *v.* Spain, *ibid.* 2638, 2641 (under agreement of Dec. 14, 1882, *infra*).

⁴ Moore's Arb. 2583, at pp. 2586-2589.

the recent Spanish Treaty Claims Commission in the case of Ruiz v. United States, No. 112.¹

In the decision of Umpire Bertinatti in the case of Medina v. Costa Rica,² it was held that the judgment of an American court was not binding on Costa Rica, and that while a duly issued certificate of naturalization is presumptive evidence of its validity, "the presumption of truth must yield to truth itself," and where the existence of facts is shown, which, had they been known, would cause the application for naturalization to have been rejected, *e. g.*, a residence in the United States much shorter than the five years required by statute, the certificate of naturalization will be considered incompetent to confer citizenship.

The United States-Mexican commission of 1868 dismissed the claim of Perez³ because of his failure, as an alleged naturalized citizen, to comply with the residence requirements of our naturalization statutes, notwithstanding his possession of a certificate of naturalization. Mr. Thornton, umpire of that same commission, held that the tribunal was not bound to admit the citizenship of a claimant when the evidence showed that his certificate of naturalization had been obtained by the false swearing of certain witnesses before the municipal court which granted naturalization.⁴

The question of the finality of a certificate of naturalization was argued very fully before the United States-Spanish commission under the protocol of February 12, 1871. By that protocol it was provided that Spain shall have the right to "traverse the allegation of American citizenship, and thereupon competent and sufficient proof thereof will be required." In the case of Delgado,⁵ Umpire Bartholdi declined to inquire into the validity of the claimant's naturalization,

¹ Reprinted in Van Dyne, *Naturalization*, 144-178. Commissioner Maury's able dissenting opinion is also worthy of note, *ibid.* 178-189. Valuable briefs on the question were filed by attorneys for the claimants and by the Government in the cases of Adolphus Torres v. U. S., No. 45 and Rita L. de Ruiz *et al.* v. U. S., No. 112. Briefs of the Spanish Treaty Claims Commission, v. 7.

² Medina (U. S.) v. Costa Rica, July 2, 1860, Moore's Arb. 2583, 2587.

³ Perez (U. S.) v. Mexico, July 4, 1868, *ibid.* 2719 (Wadsworth, commissioner).

⁴ Lizardi (U. S.) v. Mexico, July 4, 1868, *ibid.* 2589.

⁵ Delgado (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. 2590-2592.

it appearing that he had resided in the United States over five years and no charge of fraud having been made. In a second case, Ortega,¹ a failure to comply with the naturalization laws was clear. The umpire, therefore, dismissed the claim and refused to be bound by the certificate of naturalization. This amounted to a denial of the position of the advocate of the United States that the certificate of naturalization must be accepted as final. The interposition of the Department of State being invoked, Secretary Evarts first expressed the opinion that the powers of the Commission were not "judicial," and that in effect the Commission could not question a certificate of naturalization. Baron Blanc, Bartholdi's successor as umpire, in the case of Dominguez² held that it was his duty to determine whether the certificate of naturalization was procured by fraud or was granted in violation of treaty stipulations or of the rules of international law, but that Dominguez's absence from the United States prior to his admission to citizenship did not work a change of legal residence; and assuming that the naturalization court had taken this view, it must prevail so long as it is unreversed by an American court.³ The Spanish Arbitrator, Marquis Potestad, protested against the ruling that the decision of an American court is final, and against a proposition of the umpire that the tribunals of the United States are the sole interpreters of the laws of the country. Secretary Evarts, again called upon, held that the tribunal, as an international judicial body, could "bring under judgment the decisions of local courts of both nations." He thus in effect upheld the protest of Marquis Potestad. When Count Lewenhaupt succeeded Baron Blanc as arbitrator, the whole question was reargued.⁴ In the case of Buzzi,⁵ the umpire decided that the claimant had no right to appear as an American citizen, since it was shown that during the five years immediately preceding his naturalization he had lived about four and a half years in Cuba. Secretary of State Blaine, who had succeeded Mr. Evarts, instructed

¹ Ortega (U. S.) v. Spain, Moore's Arb. 2592.

² Dominguez (U. S.) v. Spain, *ibid.* 2595-2597.

³ The history of this question before the Commission is presented by Mr. Moore in his Digest, III, 506-509. See also Moore's Arb. 2593 *et seq.*

⁴ Moore's Arb. 2601-2613.

⁵ Buzzi (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. 2613.

the American counsel to state that the United States could not accept the judgment as within the competence of the umpire to render, and that a duly issued certificate of naturalization was the judgment of a court, which could not be reversed or reviewed by the Executive or by an international commission.¹

Secretary Frelinghuysen, Mr. Blaine's successor, did not adhere to the radical position of Secretary Blaine, but, while insisting that the Department had conferred no power on the Commission to examine into the object or motive of an applicant in seeking naturalization nor to make actual presence in the United States for five years immediately preceding naturalization a requisite, nevertheless admitted that a certificate of naturalization may be proven to have been obtained fraudulently, and added that the certificate could only be impeached "by showing that the court which granted it was without jurisdiction, or by showing, in conformity with the adjudications of the courts of the United States on that topic, that fraud, consisting of intentional and dishonest misrepresentation or suppression of material facts by the party obtaining the judgment, was practiced upon it, or that the naturalization was granted in violation of a treaty stipulation or of a rule of international law."²

This was accepted as a binding rule by the Commission, and several claims of alleged naturalized citizens were dismissed on one or other of the above grounds.³ In several other cases it was held that there was no proof of intentional misrepresentation or fraud within the meaning of the rule adopted, and that claimants were entitled to appear as citizens of the United States.⁴

The French-United States mixed commission under the treaty of January 15, 1880, held that they had the right to examine the original

¹ Moore's Arb. 2618. The radical position of Mr. Blaine has been generally disapproved.

² Moore's Arb. 2619-2621.

³ *Angarica (U. S.) v. Spain*, *ibid.* 2621, 2624; *Criado*, *ibid.* 2624, 2626. See also cases of *Buzzi*, and *Ortega*, *supra*.

⁴ *Zenea*, Moore's Arb. 2626 (held no fraud, although naturalized before he was 21; see Moore's comment, *ibid.* 2629); *Zaldivar*, *ibid.* 2630 (suspicion of irregularity, but no fraud); *Govin y Pinto*, *ibid.* 2635; *Madan*, *ibid.* 2638, 2642; *Antonio M. Mora*, *ibid.* 2642, 2645 (burden of proof on Spain); *Rozas*, *ibid.* 2646; *Montejo*, *ibid.* 2643. See the statements of the Marquis de Potestad, Spanish Arbitrator, on these claims, *ibid.* 2631-2635.

proceedings for naturalization, and finding that the certificate of naturalization was obtained by misrepresentation of material facts, they held it to be null and void.¹

In the Flutie case before the United States-Venezuelan commission of 1903, in an able opinion, it was held that a certificate of naturalization is not binding on an international commission to establish the citizenship of a claimant where the facts show that the necessary prerequisites for granting the certificate were not fulfilled by the applicant for naturalization.²

The recent Spanish Claims Commission heard extended and able arguments on the question now under discussion in the cases of Torres and Ruiz. In an elaborate opinion in the Ruiz case, after reviewing decisions of other commissions, they held:

"The judgment of naturalization is *prima facie* evidence of its regularity and will be given full faith and credit until the defendant overcomes its conclusiveness by proof. The degree of proof which will constitute a sufficient demonstration by the defense in cases of fraudulent naturalization must necessarily rest in the discretion of the Commission. . . . The burden upon the defendant in this case is to prove the legal fraud perpetrated by claimant in the procurement of his naturalization certificate and cannot be shifted by evidence showing errors or irregularities in the proceedings or by raising a doubt merely in the minds of the Commission. The proof cannot stop at showing that the facts made to appear to the satisfaction of the court which granted naturalization were false. It must at least go to the extent of satisfying the Commission that the statements and representations made by him at the time he filed his original declaration and at the time of procuring the judgment were false, or facts must be proven from which such fraud would be implied, and it must appear that his false representations and the representations procured by him to be made by the other witnesses were intentionally used by him for the purpose of deceiving the court and thereby securing his certificate of naturalization."³

§ 227. Conclusiveness upon the Executive.

On the theory that naturalization, while a judicial, is not an adversary

¹ Kuhnagel (France) *v. U. S.*, *ibid.* 2647, 2649; Boutwell's Report, 72 (in which the decision upheld claimant's French citizenship). See also Bouillotte (France) *v. U. S.*, *ibid.* 2650, 2652.

² Flutie (U. S.) *v. Venezuela*, Feb. 17, 1903, Ralston, 38, 41.

³ Ruiz *v. U. S.*, Spanish Treaty Cl. Com., No. 112, printed in Van Dyne, *Naturalization*, 177-178. See Final Report of the Commission, May 2, 1910, 13-14.

proceeding, and that it is an *ex parte* proceeding in which the government has neither notice nor appears, it has been held that the United States is not concluded by erroneous recitals in the record.¹

Whether it is on this ground or in the exercise of the discretion vested in the Secretary of State by § 4075 of the Revised Statutes, it is certain that the Department of State declines to recognize the validity of a certificate of naturalization when it appears that it was obtained by mistake or by fraud, and refuses to issue a passport upon it, without reference to the holder's rights otherwise as a citizen.² If a passport is obtained through such a certificate and subsequently that fact becomes known, a cancellation or return of the passport is demanded, or appropriate representations made to the proper foreign government.³ Similarly, a certificate of naturalization being only *prima facie* evidence of citizenship and therefore of title to protection, diplomatic protection may be and is declined whenever it appears that the certificate was fraudulently obtained⁴ or that the naturalized citizen has, either according to statute⁵ or international practice,⁶ forfeited his right to diplomatic protection.

¹ *Johannessen v. U. S.*, 225 U. S. 227, 237; Akerman, Atty. Gen., in 13 Op. Atty. Gen. 176, although his legal reasons are inaccurate; Mr. Fish, Sec'y of State, Circulars of May 2, 1871, For. Rel., 1871, pp. 25, 26. International commissions, as has been observed, have held that foreign governments are not bound, *supra*. See also *Ruiz v. U. S.*, in Van Dyne, 166.

² Mr. Bayard, Sec'y of State, to Mr. Scruggs, May 16, 1885, For. Rel., 1885, 211, and other instructions in For. Rel., paraphrased in Moore's Dig. III, 510-513, 909-910. Mr. Hay, Sec'y of State, to Mr. Sampson, Jan. 21, 1902, For. Rel., 1902, 389.

³ Mr. Bayard, Sec'y of State, to Mr. McLane, Dec. 8, 1888, For. Rel., 1888, I, 565, and Moore's Dig. III, § 524.

⁴ Mr. Fish, Sec'y of State, to Mr. Maynard, Feb. 11, 1876, Moore's Dig. III, 505; Mr. Blaine, Sec'y of State, to Mr. Hirsch, Dec. 17, 1890, *ibid.* 512. See also 14 Op. Atty. Gen. 295.

⁵ Act of March 2, 1907, § 2; Act of June 29, 1906, § 15.

⁶ *E. g.*, Failure of *bona fide* intention to assume duties of American citizenship. Margolin's case, For. Rel., 1901, 450-451. Refusal to present evidence of citizenship, Moribold case in China, 1912. See *infra*, § 337 *et seq.*

CHAPTER III

NATURALIZATION AND OTHER TITLES TO CITIZENSHIP OR PROTECTION

FRAUDULENT NATURALIZATION

§ 228. Municipal Penalties.

The statutes of the United States penalize false swearing in any of the proceedings under the naturalization laws,¹ as well as false personation, forgery, altering or using a false or counterfeit certificate of naturalization,² or unlawfully procuring naturalization.³

It has been noted that the United States may bring suit to set aside or cancel a fraudulently obtained naturalization certificate.⁴ Section 15 of the Act of June 29, 1906, provided for the first time that when a naturalized citizen establishes a permanent residence abroad within five years after his naturalization, it shall be deemed *prima facie* evidence that the naturalization was obtained in bad faith. The relevant provisions of this section have been incorporated in substance in a circular instruction of the Department of State on the subject dated April 19, 1907,⁵ which reads:

“When any alien who has secured naturalization of the United States shall proceed abroad within five years after his naturalization and shall take up his permanent residence in any foreign country within five years after the date of his naturalization, it shall be deemed *prima facie* evidence that he did not intend in good faith to become a citizen of the United States when he applied for naturalization, and in the absence

¹ Act of March 4, 1909, § 80 of the U. S. Criminal Code; Act of June 29, 1906, § 23.

² Act of March 4, 1909, §§ 74-79, U. S. Criminal Code, repealing §§ 16, 17 and 19 of Act of June 29, 1906.

³ Act of June 29, 1906, § 23. The statutes above mentioned and various other statutes relating to crimes and offenses against the naturalization laws are set out in Van Dyne, *Naturalization*, 189-196, 414-416.

⁴ *Supra*, p. 520.

⁵ For. Rel., 1907, 8. Printed also in Van Dyne, 136-138.

of countervailing evidence it shall be sufficient in the proper proceedings to authorize the cancellation of his certificate of citizenship as fraudulent. Diplomatic and Consular officers shall furnish the Department of State, to be transmitted to the Department of Justice, the names of those within their jurisdictions, respectively, who are subject to the provisions of this requirement, and such statements from Diplomatic and Consular Officers shall be certified to by such officers under their official seals, and are under the law admissible in evidence in all courts to cancel certificates of naturalization.¹

Section 15 of the Act of 1906 has been held by the Supreme Court² to be retroactive. While suit to cancel fraudulently or illegally obtained naturalization certificates has been brought under the Act in several instances,³ it appears that the Department of Justice has limited its proceedings under the statute to cases in which it seemed that the result of the suit would benefit the citizenship of the country.⁴ It seems that the proceeding is both difficult and expensive.

§ 229. Presumptions of Fraud.

Besides the statutory cases of fraudulent naturalization, there are numerous cases in which naturalization is obtained by a technical compliance with the statutes, but without any intent to reside permanently in the United States. Such naturalization may be considered fraudulent. The applicant intends to reside in his native or perhaps

¹ This paragraph was also added to the Diplomatic Instructions and Consular Regulations, under the provisions of the Executive Order of April 6, 1907.

² *Johannessen v. U. S.*, 225 U. S. 227; *Luria v. U. S.*, 231 U. S. 9. See the fourth paragraph of § 15.

³ *U. S. v. Nesbit*, 168 Fed. 1005; *U. S. v. Mansour*, 170 Fed. 671; *U. S. v. Simon*, 170 Fed. 680; *U. S. v. Meyer*, 170 Fed. 983; *U. S. v. Spohrer*, 175 Fed. 440; *U. S. v. Ellis*, 185 Fed. 546; *U. S. v. Luria*, 184 Fed. 643, 231 U. S. 9; *U. S. v. Albertini*, 206 Fed. 133; *Johannessen v. U. S.*, 225 U. S. 227.

⁴ Part of Circular letter No. 107 of the Dept. of Justice of Sept. 20, 1909, containing instructions as to naturalization matters, reads:

"In the opinion of the Department, as a general rule, good cause is not shown for the institution of proceedings to cancel certificates of naturalization alleged to have been fraudulently or illegally procured unless some substantial results are to be achieved thereby in the way of the betterment of the citizenship of the country. The legislation referred to, being retroactive, is construed to be remedial rather than penal in its nature; for the protection of the body politic rather than for the punishment of the individuals concerned." The British Nationality Act, 1914, Part II, § 7, gives the Secretary of State authority summarily to revoke a fraudulently obtained certificate.

in another country and to use his naturalization to avoid duties and responsibilities to which without it he would be subject. Before the Act of June 29, 1906 and the Act of March 2, 1907, which defined the cases in which the presumption of expatriation arises by reason of residence abroad for certain periods of time, this government was frequently imposed upon by persons who claimed, as naturalized citizens, the right to American protection and release from duties owed to their native country. Secretary of State Fish sedulously supported the principle that an alien who obtains naturalization in the United States not with a view to perform the duties of American citizenship, but with a view to escape the obligations of citizenship in the land of his nativity in which he resumes his residence, is guilty of a double fraud which the government of his adoption should not, by giving him its protection, aid him to consummate.¹

This became a rule of action in the matter of protecting naturalized citizens, but it was difficult to apply because it was not easy to determine when a naturalized citizen had permanently resumed residence in his native land without an intention to return to the United States.² These abuses of naturalization were discovered particularly in military service cases in which the person in question had obtained American citizenship and then upon return to his native country had used his naturalization to evade the obligation of military service. The Bancroft naturalization treaties³ sought to provide definite rules for the determination of these cases in the countries with which they were concluded, but in various other countries diplomatic controversies have been frequent. When it appeared evident that the person had abandoned his American residence permanently and that

¹ Circular of Oct. 14, 1869, Moore's Arb. 2563-2564, printed also in Morse, Citizenship, 233-235. See Moore's Arb. 2564, and citation to Geo. F. Edmunds memorial address; 14 Op. Atty. Gen. 295; Wharton, II, § 176; For. Rel., 1877, 246; Morse, 228. See also Moore's Dig. III, § 377. For an account of British practice, see H. Doc. 326, 59th Cong., 2d sess., 349 *et seq.*, and the British Nationality Act, 1914, Part II, § 3 (1), 4 & 5 Geo. V, ch. 17. *Flutie (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 38, 42.

² Mr. Cadwalader, Act'y Sec'y of State, to Mr. Jay, Oct. 5, 1874, For. Rel., 1874, 33; Mr. Tillman to Mr. Sherman, Dec. 7, 1897, For. Rel., 1897, 127; Mr. Logan in For. Rel., 1879, 143-145; Mr. Hunter in For. Rel., 1880, 108.

³ *Infra*, p. 548.

the naturalization was in fact fraudulently used to escape obligations otherwise due, protection has been withdrawn.¹

Some years ago, when diplomatic officers were permitted to issue passports, the Department of State directed that when the renewal of passports was frequently demanded by alleged Americans resident abroad they were to be warned that the declaration of intention to return to the United States was not an empty phrase and that a further passport should be refused unless for special reasons it was clear that the foreign residence was not inconsistent with *bona fide* American citizenship.

The criteria for determining when naturalization was obtained fraudulently or claimed inconsistently with American citizenship were much simplified by the application of the presumptions defined in the Acts of June 29, 1906 and March 2, 1907.² Section 15 of the Act of 1906 provides that the permanent residence of a naturalized citizen in any foreign country within five years after his naturalization shall be deemed *prima facie* evidence that his naturalization was obtained in bad faith. It still leaves the diplomatic or consular officer to determine from all the circumstances when the residence is "permanent." By § 2 of the Act of 1907, two years' residence of the naturalized citizen in the country of his origin or five years' residence in any other country creates a presumption that he has ceased to be an American citizen, and unless that presumption is rebutted by showing some special and temporary reason for the change of residence, the obligation of protection by the United States is deemed to be ended.

It has already been noted that whenever it appears to the Department of State that naturalization has been improperly or improvidently granted to a person claiming an American passport or diplomatic protection on the strength of a naturalization certificate, the passport and protection are refused.³

¹ Mr. Olney, Secretary of State, to Mr. Townsend, For. Rel., 1895, 24. When the naturalized citizen has, on return to his native country, flaunted his naturalization and boasted of his immunity from burdens to which his neighbors were subject, thereby incurring the penalty of expulsion "for reasons of public welfare," the United States has declined to intervene in his behalf. For. Rel., 1894, pp. 30-36, *supra*, pp. 53, 56.

² Aide memoire of the Dept. of State, December 20, 1909, For. Rel., 1909, 35.

³ *Supra*, p. 527.

§ 230. Criteria Applied by Municipal and International Courts.

As to what is fraud, no definite rule can be laid down. It would seem, however, that it must in general be positive rather than negative. Thus, it was held in *United States v. Norsch*,¹ that an applicant who merely presented himself for naturalization, knowing that he was not entitled thereto was not guilty of fraud, the court adding, that only when he resorts to false testimony or to some trick or artifice with a view to deceiving the court, is he guilty of fraud.²

Attention has already been called to the views of international commissions on the question of fraudulent naturalization, and to the general rule adopted by them that the fraud which renders naturalization invalid must consist in intentional and dishonest misrepresentation as to a material fact or in the willful suppression of material facts.³ Under the rule of the Spanish Claims Commission adopted December 14, 1882,⁴ some curious decisions were handed down as to what constituted fraud. The doubtful regularity of claimant's naturalization was held not to constitute fraud.⁵ In other cases, however, the rule appears to have been too liberally interpreted. Thus, the naturalization of a person before he was twenty-one, notwithstanding his false representations, was held not to constitute fraud.⁶ Similarly, clear proof of failure to comply with the five years' residence requirements was in a number of cases held not to constitute fraud.⁷ Other commissions have considered that naturalization obtained notwithstanding failure to comply with residence requirements was a *prima facie* evidence of or equivalent to fraud or misrepresentation and to disentitle the claimant from appearing before the commission as an American citizen.⁸

¹ *U. S. v. Norsch*, 42 Fed. 417, 419; *Matter of McCarran*, 8 Misc. (N. Y.), 482.

² For other cases in municipal courts, see H. Doc. 326, 59th Cong., 2d sess., 134, and cases under § 15 of the Act of 1906, cited *supra*, p. 529, note 3.

³ *Supra*, p. 522. See particularly *Angarica (U. S.) v. Spain*, Feb. 12, 1871, *Moore's Arb.* 2621, and *Criado, ibid.* 2625.

⁴ *Supra*, p. 525.

⁵ *Zaldivar (U. S.) v. Spain*, Feb. 12, 1871, *Moore's Arb.* 2630; *Govin (U. S.) v. Spain, ibid.* 2629 (*dictum*).

⁶ *Zenea (U. S.) v. Spain, ibid.* 2626.

⁷ See, e. g., *Montejo (U. S.) v. Spain, ibid.* 2646; *Macias (U. S.) v. Spain, ibid.* 3775, No. 52, Original opinion, MS. Dept. of State; *Govin Y Pinto, ibid.* 2635; *Rozas, ibid.* 2646. See also *Madan, ibid.* 2641, and *Portuondo, ibid.* 2565.

⁸ *Medina (U. S.) v. Costa Rica*, July 2, 1860, *ibid.* 2583, 2587; *Perez (U. S.) v.*

While the abandonment of American citizenship by a naturalized citizen may be visited with the same results as fraudulent naturalization (and the Act of 1906 in fact provides that the establishment of a permanent residence abroad within five years after naturalization shall be considered *prima facie* evidence of the bad faith of the naturalization), international commissions have considered abandonment of citizenship as distinct from fraudulent naturalization as a ground of forfeiture of diplomatic protection or citizenship.

While the practice of the Department of State has not been uniform, the attempt is now generally made to secure and destroy a fraudulently obtained naturalization certificate, just as a wrongfully held passport is retained and cancelled. The demand for legislation empowering the government to bring suit to cancel records of naturalization obtained by fraud has been met by the Act of June 29, 1906.¹ Section 7 of the recent British Nationality and Status of Aliens Act enables the Secretary of State to revoke any certificate obtained by fraud, and order it to be given up and cancelled, an obligation enforced by criminal proceedings.²

INTERNATIONAL EFFECTS OF NATURALIZATION

§ 231. Nature and Effect of Naturalization.

Naturalization is in effect an act of adoption by which a foreigner at his expressed or implied volition, is granted citizenship, with its incidental rights, upon his compliance with the conditions prescribed by the municipal law of the adopting country.³ It is an act of public law whose validity can in theory be determined only by the naturalizing country, within whose right it is to fix the conditions under which Mexico, July 4, 1868, *ibid.* 2719, and *Lizardi (U. S.) v. Mexico*, *ibid.* 2589; *Kuhnagel (France) v. U. S.*, *ibid.* 2647, 2649 (same principle); *Flutie (U. S.) v. Venezuela*, Feb. 17, 1903, *Ralston*, 38, 41; *Ruiz v. U. S.*, No. 112, *Spanish Treaty Cl. Com.*, *supra.*, p. 526.

¹ *Supra*, p. 528. See also Moore's Dig. III, § 425.

² Part II, § 7 (2), 4-5 Geo. V, ch. 17. Under the new Act (§ 8) the government of any British possession has the power to grant a certificate of naturalization having the same effect as a certificate granted by the British Secretary of State. In the self-governing dominions, the Act must first have been adopted. See E. B. Sargent on Naturalization in the British dominions, in No. 31 (July, 1914), *Journ. of the Soc. of Comp. Leg.* 327-336.

³ Stoicesco, C. J., *Etude sur la naturalisation*, Paris, 1876, p. 236.

the concession of citizenship is extended.¹ These conditions vary from country to country.² Cockburn in his well-known work on nationality has said that assuming the competency of a person to change his allegiance, "the effect of naturalization ought, by the common law of nations, to be everywhere to supersede and put an end to the nationality of origin, even where by expatriating himself the subject has offended against the law of the original country and may remain amenable to punishment should he return to it."³

The comity of legislation which would be necessary to bring about this condition and thus avoid cases of dual nationality has not yet been manifested by the majority of the states of the world. Many countries still deny the right of expatriation or place such onerous restrictions upon its exercise as to amount to a practical denial of the right.⁴ While numerous treaties between the United States and certain foreign countries have aided greatly in adjusting conflicting claims to the allegiance of persons who have become naturalized citizens of the United States, and while municipal statutes and executive regulations of the United States have furnished criteria to establish the *bona fide* character of the American citizenship of a naturalized American citizen abroad and of his right to diplomatic protection, the fact, nevertheless, that there are various countries of the old world which deny absolutely or conditionally the right of expatriation and with which no naturalization treaties have been concluded, and the fact that the treaties do not extend to all cases, still make conflicts of nationality and cases of no nationality of frequent occurrence. The various types of cases which have engaged the attention of the United States in its diplomatic intercourse with foreign countries will be discussed presently.

¹ De Folleville, D., *Traité . . . de la naturalisation*, Paris, 1880, p. 4; Pradier-Fodéré, III, § 1658.

² De Folleville in Part four of his work undertakes a comparative study of the law in the countries of Europe and America. See also Lehr, E., *La nationalité*, Paris, 1909; Sieber, J., *Das Staats-bürgerrecht im internationalen Verkehr*, Bern, 1907, 205-410; Cogordan, *La nationalité*, Paris, 1890, 171-271 and Appendix; and Zeballos, E. S., *La nationalité au point de vue de la législation comparée et du droit privé humain*, trad. par A. Bosq, Paris, 1914, 2 v.

³ Cockburn, *Nationality*, London, 1869, 208.

⁴ Pradier-Fodéré, III, § 1661 and *infra*, §§ 237, 238.

Before examining the position of naturalized American citizens abroad, it may be well to note the views of the United States on certain conditions attaching to naturalization in general.

§ 232. Conditions of Recognition.

The United States has always insisted that naturalization requires the voluntary act and the express or tacit consent of the individual to be naturalized. This view has been expressed on various occasions in connection with the attempts of different states of Latin-America by municipal law to impose their nationality on foreigners. Thus, the statutes of Peru, Mexico, Brazil, Venezuela and other countries, imputing their nationality *ipso facto* upon persons who purchase real estate or have children born to them in those countries have met with vigorous protest and a refusal of recognition by the United States.¹ The fact that the law of Mexico and Brazil permitted the foreigner, by affirmative action on his part, to retain his original nationality was not considered to alter the position of the United States that "the loss of citizenship cannot be imposed as a penalty nor a new national status forced as a favor by one government upon a citizen of another."² In a few countries of Latin-America, the acceptance of certain public offices naturalizes a foreigner.³ As the acceptance of such office is presumably a voluntary act of the foreigner, his con-

¹ Moore's Dig. III, § 378. See also Hall, Foreign powers and jurisdiction, 46; Cogordan, Nationalité, 117-118; Pradier-Fodéré, III, § 1658; Robinet de Cléry in 2 Clunet (1875), 80. The decisions of the mixed commission of July 4, 1868 with Mexico, on the acquirement of citizenship by owning real estate, have been discussed, *supra*, p. 492.

² Mr. Bayard, Sec'y of State, to Mr. Manning, Nov. 20, 1886, For. Rel., 1886, 723; Pradier-Fodéré (III, § 1658), points out that from this point of view the acquisition of citizenship by naturalization may be considered as a contract between the alien who requests it and the state which grants it. Octavio Rodriguez in an article on the Brazilian law of nationality states that while Portugal, Spain, Great Britain, Italy and Austria protested against the provision of the Brazilian Constitution of 1891 by which aliens who had not claimed their original nationality by Aug. 24, 1891 became citizens of Brazil, Brazil has maintained its position. It seems, from a note sent to the French government, that the law was not strictly enforced. 6 Rev. de l'Inst. de dr. comp. 302-304.

³ Guatemala and Salvador, cited by Harmodio Arias in his article, Nationality and naturalization in Latin-America, in 11 Journ. of the Society of Comp. Leg. (Nov. 1910), 126, at 136. Norway and Germany appear to make similar provision.

sent to the legal consequences of his act may be inferred.¹ The United States recognized the validity of a Haitian law which provided for certain grants of land to immigrants on condition that they became Haitian citizens.²

A reasonable distinction would result in a denial of the right to impose citizenship based upon mere residence, or marriage with a native woman or the acquisition of real property, or acts generally of a purely civil and personal nature; whereas such naturalization by operation of law should be recognized if it involves the enjoyment of political rights or privileges or if the consent of the naturalized person may be inferred. The acquirement of citizenship through the naturalization of the parent or husband or by marriage of an alien woman to a citizen or by treaty or annexation of territory are almost universally recognized as valid instances of naturalization by operation of law.

While it is not considered within our province to discuss the various methods of naturalization provided by the municipal law of the United States,³ *e. g.*, by naturalization of the parent, by virtue of the marriage relationship, and collective naturalization, either by the admission of new states or by treaty or conquest, it may be desirable to point out one or two features of American naturalization which have at times had an international bearing.

§ 233. Certain Features of American Naturalization having International Importance.

The United States pays no regard to the important particular of the capacity of the applicant for naturalization, according to the municipal law of his original country, to divest himself of his former allegiance. This is of course a necessary consequence of the application of the doctrine of voluntary expatriation. Prussia, Bavaria and

¹ Hall goes somewhat further in concluding that a wish to identify himself with the state may be inferred from the performance of political acts. Cited by Arias, *op. cit.*, 137. See Hall, *Foreign powers and jurisdiction*, 46.

² Mr. Hay, Sec'y of State, to Mr. Powell, Dec. 1, 1899, *For. Rel.*, 1899, 403.

³ See works noted *supra*, p. 457, and particularly H. Doc. 326, 59th Cong., 2d sess., 138-159, and Moore's *Dig. III*, §§ 413-415 (Naturalization of parent), §§ 408-412 (marriage relationship), §§ 379-380 (collective naturalization). On citizenship by annexation of territory, see also cases in Moore's *Arb.* 2509-2518, 2538, 2541-2542.

Sweden appear to be among the few European states which inquire into the capacity of the applicant to abjure his native allegiance,¹ although Great Britain until 1914 provided by statute that the naturalized subject shall not be deemed a British subject within the limits of his former country, unless by its laws or by treaty, he has ceased to be a subject thereof.²

Naturalization in the United States depends upon a compliance with certain conditions, including, in the usual form of naturalization, continuous residence in the United States for a period of five years immediately prior to naturalization.³

It has been generally held that the words "continuous residence" are to be understood in the legal case, according to which a transient absence for business, pleasure or other occasion, with the intention of returning, does not interrupt the period of residence.⁴ This is the construction placed upon the words "resided uninterruptedly" in certain naturalization treaties of the United States with other states (*e. g.*, Bavaria and Württemberg) and is expressly so defined in protocols annexed to those treaties.⁵ The courts construe the provision for "continuous residence" as practically equivalent to domicile and do not require a continuity of physical presence,⁶ the question whether

¹ Cockburn, *Nationality*, 48-49.

² *Supra*, p. 461. In the British Nationality and Status of Aliens Act, 1914, this qualification of British naturalization has been dropped, Part II, § 3 (1). On the effect of the qualifying clause (33-34 Vict. ch. 14, § 7, par. 3), see F. B. Edwards, *The effect of a certificate of naturalization in 30 Law Quar. Rev.* (1914), 433, 436-447.

³ For interpretations by municipal courts and authorities of the five years' residence requirement see H. Doc. 326, 59th Cong., 2d sess., 102-114. For the history of the residence requirements in U. S. naturalization acts, see F. Van Dyne in 29 *Amer. Law Rev.* 52-58, Moore's Dig. III, § 388, and Naturalization of George Edward Lerrigo, Hearings before the House Committee on Immigration and Naturalization, 63rd Cong., 2nd sess., May 21, 1914, part 2, especially letter from J. B. Densmore, Act'g Sec'y of Labor, p. 16. Mr. Lerrigo was naturalized by Act of Congress, Feb. 23, 1915, notwithstanding the fact that he had not resided five years in the U. S. prior to the Act. His case presented peculiar circumstances which justified naturalization. See Hearings cited.

⁴ 13 Op. Atty. Gen. 376.

⁵ Hunt's *The American passport*, Washington, 1898, p. 175. The same interpretation would be made of other treaties.

⁶ *U. S. v. Rockteschell*, 208 Fed. 530.

there has been a continuous residence being one of fact for determination under all the circumstances of the case.¹

In our discussion of fraudulent naturalization, we have considered the views of various international commissions as to the effect of failure to comply with the requirements for a continuous residence in its relation to fraud under the naturalization laws.² In the issuance of passports, the State Department has to determine whether a non-compliance with the residence requirements of the statute amounts to fraud warranting a refusal to recognize the validity of the naturalization certificate and a refusal of a passport. The question also becomes of importance because of the provision in our naturalization treaties making five years' uninterrupted residence in the United States a condition precedent to recognition by the original government of the change of allegiance of a naturalized citizen. It has been held that a petition for the cancellation of a certificate of naturalization under § 15 of the Act of June 29, 1906, on the ground of want of the necessary previous residence, must show either fraud or that the evidence before the court which granted the certificate was insufficient to warrant the finding of residence.³

It may here be observed that the statutes of the United States in granting naturalization look to the past and not to the future, in that they require a compliance with conditions preceding naturalization and require no evidence or manifestation of intention to remain a citizen of the United States. The applicant may leave the United States as soon as he is naturalized. By the declaration of intention he merely states his intention to become a citizen. He is not required to state that he intends to make his domicile in the United States. This defect in the law, which it appears is avoided by the naturalization laws of practically all the European countries, has brought about many complaints of the imposition practiced upon the United States by naturalized American citizens residing abroad, who sought naturalization for the sole purpose of securing protection.⁴ While the Nat-

¹ U. S. v. Cantini, 212 Fed. 925.

² *Supra*, pp. 522 *et seq.*, 532.

³ U. S. v. Rockteschell (Oct. 1913), 208 Fed. 530.

⁴ Report of the Commission on Naturalization, Nov. 8, 1905, H. Doc. 46, 59th Cong., 1st sess., 14-15.

uralization Act of June 29, 1906 has not rectified the omission by requiring the applicant to swear that he intends to make his permanent residence in the United States, § 15 authorizes proceedings for the cancellation of the certificate of a naturalized citizen who within five years of his naturalization establishes a permanent residence abroad, and § 2 of the Act of March 2, 1907, provides that a residence of two years in his native land or five years in any other foreign country creates a rebuttable presumption of his expatriation.

Under the regulations of the Department of State passports are as a rule issued only to those naturalized citizens abroad who declare an intention to resume their residence in the United States.¹

§ 234. Non-Retroactivity of Naturalization.

It is a fairly established principle that naturalization has no retroactive effect. Most of the naturalization treaties of the United States expressly provide that the naturalized citizen is punishable in his native country for violations of law committed prior to his emigration. Thus, desertion after the call to arms or while in the active service is an offense "from the penalty of which exemption by foreign naturalization is neither claimed nor conceded by the United States."² In countries in which military service is compulsory and with which the United States has naturalization treaties, it would seem that a naturalized citizen who failed to respond to the call to arms, when after having served the required number of years, he was placed on the reserve rolls, and then emigrated to the United States in time of peace and before the call to arms, and became duly naturalized, is secured by the terms of the treaties from punishment for desertion, the obligation to military service having arisen after his emigration.³ Similarly,

¹ The exception is made in the case of American naturalized citizens resident in a semibarbarous country or in a country in which the U. S. exercises extraterritorial jurisdiction, in which residence may be indefinitely prolonged without forfeiting American citizenship or protection. Circular instruction, March 27, 1899. Such citizenship is no longer inheritable from generation to generation, but is subject to the provisions of § 1993, R. S., *infra*, § 333.

² Mr. Bayard, Sec'y of State, to Mr. Turner, Sept. 10, 1885, Moore's Dig. III, 425. See also Moore's Dig. III, §§ 401-402.

³ Cases of *L. Sedivy* and *F. Holasek v. Austria*, For. Rel., 1896, 6-13, 16. See also For. Rel., 1900, 30.

emigration prior to the year when liability to service arises or before conscription, carries exemption, under the treaties, from penalties for non-fulfillment of military duty.¹ When, however, the emigration was due solely to a desire to evade military duty, the United States has often yielded to the asserted right of the native state to expel the emigrated person should he undertake to settle in his native home as a naturalized American citizen, free from the obligation of military service.² It is usually provided, at least in the Bancroft treaties, that the emigrant is not punishable for the act of emigration itself, although, apart from treaty, a state has clearly the right to regulate, under penalty, the emigration of its subjects and to punish its nationals for evasion of military service. The treaties also provide for the application of the customary statutes of limitation to punishable offenses, and the United States has generally been successful under these statutes of limitation in securing a remission of penalty or liability for the naturalized citizen.³

In the case of international claims, the rule uniformly adopted is that American naturalization cannot serve to nationalize a claim which arose prior to the date of naturalization of its owner. In other words, a claim must be national in origin as well as at the time of presentation.⁴ A passage from an instruction of Secretary of State Fish may here be aptly quoted: "In granting the high privilege of its citizenship, the United States does not assume the defense of obligations incurred by the party to whom it accords its citizenship prior to his acquisition of that right, nor does it assume to become his attorney for the prosecution of claims originating prior to the citizenship of the claimant."⁵

§ 235. Protection of Naturalized Citizen in Native Country.

It has already been observed ⁶ that the statutes of the United States

¹ For. Rel., 1889, 25, 35.

² *Supra*, p. 53.

³ Moore's Dig. III, § 403.

⁴ *Ryder (U. S.) v. Chinese indemnity*, treaty of Nov. 8, 1858, Moore's Arb. 2332. Claims before Spanish commission of Feb. 12, 1871, *ibid.* 2437; *Abbiatti (U. S.) v. Venezuela*, Dec. 5, 1885, *ibid.* 2348; *Medina (U. S.) v. Costa Rica*, July 2, 1860, *ibid.* 2483. See also *infra*, § 306.

⁵ Mr. Fish, Sec'y of State, to Mr. Davis, Nov. 24, 1874, Moore's Dig. III, 429.

⁶ *Supra*, p. 460.

require and provide that naturalized citizens and native citizens shall be equally protected abroad.¹ The United States is often, however, unable to enforce this statutory obligation of equal protection to both classes of citizens by reason of the fact that several countries, *e. g.*, Russia, Turkey and Greece prohibit expatriation, and either punish the subject, upon his return, for having acquired foreign naturalization, or decline to recognize his foreign citizenship. Upon his return to his native country, he is treated as a native, and the United States is not in a position to enforce rights growing out of his American naturalization. Other countries, *e. g.*, Switzerland and France, predicate the recognition of a change of allegiance upon compliance with certain formalities for abjuring original allegiance, in the absence of which the foreign naturalization of the subject has no effect in his native country or only such effect as his native country is willing to concede. Less than half the countries of Europe have concluded naturalization treaties with the United States.

Although the naturalization treaties have done much to remove difficulties and controversies with the countries with which they have been concluded, as to the status of the naturalized citizen with respect to his new and his former country, the protection to be extended to him is limited by the terms of the treaty. Again, with respect to certain classes of persons excluded from various countries, such as Chinese in some of the Latin-American countries and Syrians in Haiti, their subsequent American naturalization has not served to exempt them from the application of the local exclusion law.² So also, the presumption of expatriation by residence abroad arises more quickly against a naturalized than against a native citizen.³

These examples will serve to indicate the limitations upon the obligation of equal protection and upon its execution and enforcement. At most, it must be understood as the duty to extend the same

¹ R. S., § 2000; 9 Op. Att'y Gen. (1859), 360; 14 *ibid.* (1873), 295; Morse on Citizenship, § 134; Wise, John S., American citizenship, 261; E. P. Wheeler in 3 A. J. I. L. (1909), 882. The American passport, 171; Mr. Fish, Sec'y of State, to Mr. Cushing, May 22, 1876, Moore's Dig. VI, 622.

² For. Rel., 1909, 242-245, quoting Sol. Op. March 5, 1909. As to the exclusion of Chinese who are British subjects, see 20 Op. Att'y Gen. 729.

³ *Infra*, § 330.

measure of protection, whenever possible, to the native and to the naturalized citizen.¹

The United States has always recognized the apparent irreconcilability of the conflict of laws in cases where a naturalized citizen, originally the subject of a country which prohibits expatriation, returns voluntarily to his native country. The view of this government has been that the effect of American naturalization is in no wise dependent upon or affected by the law of the alien's former country and his rights are effectively respected in the United States and protected in a third country. Should he, however, return to his native country, the United States, while asserting that the validity of his naturalization cannot be questioned except by an allegation of fraud in its procurement, nevertheless is aware of the fact that in the absence of a treaty of naturalization, its validity may not be practically enforceable against a counterclaim of his native country, based upon the ground that under its law he has not lost his original allegiance.² It is clear that until the freedom of expatriation is universally recognized such conflicts will occasionally occur. It seems true, also, notwithstanding the contentions of the United States as to the unlawfulness of punishing a person for becoming an American citizen, as is the law and practice of Russia, that in the absence of consent or treaty, naturalization abroad has within the limits of the country of origin no other effect than the government of that country chooses voluntarily to concede.

¹ The United States issues the same form of passport to all citizens of the U. S. (not special officials) whether native or naturalized. Many other countries make a distinction in issuing passports. The American passport, 173. During the course of the present European War, the Department of State has all but refused to issue passports to naturalized citizens, natives of the belligerent countries, the object being to avoid, so far as possible, diplomatic controversies with their former countries, or conceivably with enemy countries.

² This is the practice with Russia, Turkey and Persia. 9 Op. Att'y Gen. 356; For. Rel., 1893, 498-501, Moore's Dig. III, 780-781. But in many cases where naturalized American citizens have been imprisoned upon their return to Turkey and Russia, their native lands, the good offices of the diplomatic representative of the United States have been successful in obtaining their release. Wheaton's often quoted statement in 1840 to a naturalized citizen of Prussian origin, that on his return to Prussia, his "native domicile and national character revert" was contradicted by Att'y Gen. Black in 1859 (9 Op. Att'y Gen. 359 *et seq.*). Congress, in the Act of 1868, by providing for the equality of native and naturalized citizens, supported Mr. Black's opinion. H. Doc. 326, 59th Cong., 2d sess., 9-10.

Some of the states of Europe have avoided the controversies growing out of conflicting claims to allegiance by requiring from the applicant for naturalization proof that his change of allegiance is permitted by the sovereign of whom he is then a dependent. Great Britain recognized this principle in its Naturalization Act of 1870 by providing that the naturalization of an alien shall be without force and effect should he return to the country of his original allegiance unless by the laws thereof or by treaty between that country and Great Britain his change of status is recognized.¹

The foreign-born son of a naturalized American citizen who returns to his native country, is required, in order to have the protection of the United States, not merely to elect American citizenship upon reaching his majority, but to carry out his intention by taking measures to come to the United States and make it his permanent abode.²

§ 236. Relations with Different Countries.

It will now be appropriate to enter upon a more detailed discussion of the position of the naturalized American citizen upon his return to the foreign country to which he originally may have owed allegiance. Inasmuch as the enforceability of the statutory obligation of protection depends so largely upon the municipal law of his native country, which may not recognize his foreign naturalization or recognize it only upon the fulfillment of certain conditions, it is important to study the question in its relation to the different countries in which it has arisen. For our present purpose, these countries may be divided into:

¹ 33 Vict., ch. 14, § 7. See F. B. Edwards in 30 Law Quar. Rev. (1914), 436-447. This limitation upon the protection of a naturalized British subject has, until recently, been endorsed upon British passports. *Supra*, p. 461, and Sen. Doc. 83, 54th Cong., 1st sess., 2-3; Report of Sec'y of State Olney, Jan. 16, 1896, also printed in For. Rel., 1895, II, 147 *et seq.*, For. Rel., 1893, 683, For. Rel., 1900, 27. Nor can he claim British protection against the operation of the laws of his native country, should he return to it. Webster, P., Citizenship. pp. 9, 58. Under Palmerston's circular of Jan. 8, 1851, British protection of naturalized subjects was even more limited. Cockburn, Nationality, 114, 115; British instructions printed in For. Rel., 1873, II, 1337, 1342. In the recent British Nationality and Status of Aliens Act, 1914, this qualification has been dropped, Part II, § 3 (1), so that the British law now is probably similar to that of the United States.

² Mr. Bayard, Sec'y of State, to Mr. Straus, Sept. 30, 1887, For. Rel., 1887, 1131. See *infra*, §§ 270, 271.

(a), those which practically prohibit absolutely the expatriation of their subjects and consequently decline to recognize foreign naturalization; (b), those which, while admitting the right of voluntary expatriation, subject it to various restrictions and conditions and recognize a change of allegiance only upon a satisfactory compliance with formalities or obligations imposed by the native state—usually obtaining preliminary authorization or the performance of military service; and (c), those which by treaty with the United States have recognized the validity of American naturalization and define the status of a naturalized citizen upon return to his native country.¹

§ 237. (A) Countries Which Deny the Right of Voluntary Expatriation.

Within the first class of countries, those which prohibit the expatriation of their subjects without imperial consent—which, however, is practically never granted—are Russia and Turkey, and on occasion Greece.

Subjects of these countries when naturalized in the United States may be regarded as endowed with dual nationality, the countries of nativity and of naturalization each claiming the person's allegiance, but each incapable of enforcing its own law of citizenship within the jurisdiction of the other. Technically speaking, the United States denies the dual nationality of such persons, for the doctrine of voluntary expatriation is inconsistent with the continuation of the original nationality of the naturalized person. Under Russian law, a Russian subject who becomes naturalized abroad without imperial consent, is deemed to have committed an offense for which he is liable to arrest and punishment if he returns without previously obtaining the permission of the Russian government.² The visé of the Russian consul

¹ The attitudes of foreign governments with regard to the nature and duration of the relationship between a citizen and his government may be grouped under six types, as set forth in H. Doc. 326, 59th Cong., 2d sess., 12.

² Dept. of State circular notice Jan. 9, 1914. Notice to American citizens formerly subjects of Russia who contemplate returning to that country. Similar circulars for other countries will be cited hereafter under their date and the name of the country. In the volume of Foreign Relations for 1901, the Department of State published a series of circular notices giving a summary account of the liability, in each important country of Europe, of naturalized citizens of the United States under military and expatriation laws of their native country. In most instances, these circulars

upon the passport of a returning naturalized American citizen does not appear to constitute permission to enter Russia as an American citizen.¹

Under a Turkish law of January 19, 1869 (6 Cheval, 1285), foreign naturalization without governmental consent, is prohibited, and the Ottoman subject naturalized abroad is forbidden to return to Turkish territory under penalty of arrest and imprisonment or expulsion.² In practice, the arrest or detention is confined to such as may be necessary to accomplish the deportation of the individual, and the punitive feature is not enforced. As the expulsion is based upon the ground that the presence of such an individual is deemed prejudicial to the public interest, the United States has not opposed its enforcement.

Both in the case of Russia and Turkey, the United States has remonstrated vigorously against the arrest of or criminal proceedings against former subjects of these countries on the ground of their having become citizens of the United States without imperial permission.³ In Russia, the American protests have met with little success, although in several cases, the good offices of the American Ambassador have been successful in obtaining a release from imprisonment. An Amer-

have been superseded by later notices, as cited below. The penalty in Russia for such foreign naturalization is loss of civil rights and perpetual banishment, or exile to Siberia. Section 325 of the Penal Code, For. Rel., 1895, II, 1105, 1113. See also Moore's Dig. III, § 453.

¹ Case of Anton Yablkowski. Mr. Peirce, chargé, to Mr. Olney, October 16, 1895, For. Rel., 1895, II, 1103.

² Dept. of State circular, Feb. 29, 1912, Turkey. Mr. Uhl to Mavroyeni Bey, Nov. 28, 1893, For. Rel., 1893, 715. On return of a naturalized citizen, formerly a Turkish subject, to Turkey, his American citizenship is ignored, and should he seek to cure the matter by asking permission to be naturalized abroad, consent is coupled with the condition of non-return to Turkey. Mr. Hay, Sec'y of State, to Mr. Wilson, July 17, 1902, For. Rel., 1902, 910. See also Moore's Dig. III, §§ 459-463.

³ Russia, Mr. Olney to Mr. Peirce, Nov. 4, 1895, For. Rel., 1895, II, 1107-1108. The American passport, 144; Ginzberg's case, For. Rel., 1895, II, 1081-1096; Liszye's case, For. Rel., 1887, 943-965; *ibid.* 1888, 1399; Müller's case, For. Rel., 1888, 658-672.

Turkey, Report of Sec'y of State Olney, Sen. Doc. 83, 54th Cong., 1st sess., 3 p.; For. Rel., 1895, II, 1471-1473; Mr. Hay, Sec'y of State to Mr. Garabedian, Feb. 19, 1900, For. Rel., 1900, 938-940. See also For. Rel., 1893, 1894 and 1896, under Turkey.

ican citizen, formerly a subject of Russia, who returns to that country places himself within the exclusive jurisdiction of Russian law. In Turkey, that government's claim to treat the returned individual as a Turkish subject or to punish him for the offense of unpermitted naturalization abroad, is not pressed, and expulsion is usually the utmost penalty imposed.

No attempt is made by the United States in these or in any other countries to exempt naturalized citizens from penalties for offenses committed prior to their emigration to the United States.

§ 238. (B) Countries Which Recognize Foreign Naturalization Upon Condition Only.

A second category of countries, closely related to the first class, predicate the recognition of the American citizenship of one of their subjects upon the completed performance of certain obligations to his native state, usually the fulfillment of his military service, or upon a grant of preliminary consent to a change of nationality, which is usually withheld until military service is performed. With many variations in their requirements, this class of countries may be considered to include France, Switzerland, Italy, The Netherlands, Servia, Bulgaria, Greece (on occasion) and Persia. The United States has not concluded naturalization treaties with the countries in either of the two classes named.

These countries either do not permit a renunciation of their citizenship, without consent, during military age¹ (17 to 40, 20 to 40 or 45

¹ This is a qualified denial of the right of expatriation. *France*, Circular, Feb. 10, 1914 and Mr. Vignaud's report to Sec'y of State Sherman, August 2, 1897, For. Rel., 1897, 141 *et seq.* Case of Emile Robin, For. Rel., 1901, 156-157; case of Rene Dubuc, For. Rel., 1910, 514. *Switzerland* requires a specific renunciation of Swiss allegiance and acceptance thereof by Swiss authorities as a condition of recognizing the foreign naturalization of a Switzer. Without such acceptance, it is not recognized and Swiss citizenship descends from generation to generation. Circular of Jan. 8, 1901. Were it not for the fact that the renunciation and acceptance are mere formalities, Switzerland would have to be placed in the backward class of Russia and Turkey. On Swiss law and practice, see Moore's Dig. III, §§ 456-458. *Bulgaria* and *Greece* proclaim the principle stated in the text, but the practice is not uniform. In the case of Greece, the United States has on several occasions secured release from service for a naturalized citizen of Greek origin. Moore's Dig. III, § 444. In the case of Bulgaria and Greece, American naturalized citizens of Bulgarian or Greek origin, are advised to ascertain

generally, although it varies from country to country), or else consider foreign naturalization no bar to liability to military service.¹ A returning American citizen, naturalized without consent, who has failed to respond to the notice calling him to military service, or who has merely not performed his military duties, is liable either to arrest and trial and the compulsory performance of the service, as in France,² Italy,³ the Netherlands,⁴ Servia,⁵ and Greece,⁶ or to the payment of an annual tax, as in Switzerland.⁷

their status before their return to those countries. The Department of State does not, however, act as the intermediary. Bulgaria, Circular, Jan. 20, 1910. Greece, Circular, Jan. 31, 1901. *Servia* does not recognize a change of nationality, without consent, until the subject has performed his military obligations. Circular, April 11, 1910. *Roumania* appears to molest only those who infringed Roumanian law before emigrating. Circular, Dec. 18, 1913. *Persia* does not grant permission to a Persian subject to be naturalized abroad, if he is under charge for a crime committed in Persia, or is a fugitive from justice, or a deserter from the Persian army, or is in debt in Persia, or fled to avoid pecuniary obligations. Persian law resembles that of Turkey in that unauthorized foreign naturalization involves a prohibition to reënter Persian territory. If such a Persian subject had any property in Persia he is ordered to sell or dispose of it. Circular, May 19, 1914.

¹ *Italy*, Circular, Dec. 19, 1913, Moore's Dig., § 446. *Netherlands*, Circular, August 30, 1901 and Moore's Dig. III, § 448. The former Dutch subject may, however, avoid service by having his name removed from the military register or by becoming an American citizen prior to August 31 of the calendar year in which he reaches the age of 19. He is advised to ascertain his status before returning. As to France, Greece, Bulgaria, Servia and Switzerland, see preceding note.

² He is liable to both in France. Dept. of State circular, Feb. 10, 1914. There is a wide range of liability.

³ Between the ages of 16 and 32, the Italian is liable to arrest and forced military service. If returning when under 16, he is not molested. If over 32, he is liable to service only in the Territorial Reserve Army. Exemption from punishment for past failure to appear is contingent upon compliance with certain formalities, which may be performed at an Italian Embassy or consulate. Circular of Dec. 19, 1913; Moore's Dig. III, § 446.

⁴ In the Netherlands, he is liable to be treated (1) as a deserter, if he did not respond to the summons for service, or (2) to be enlisted if he is under forty. Circular of August 30, 1901.

⁵ He may be subject to molestation, for his unauthorized naturalization is not recognized in Servia. Circular of April 11, 1910.

⁶ He may be arrested in Greece. Circular of Jan. 31, 1901. The practice of the Greek Government is not uniform.

⁷ Whether he resides in Switzerland or not. On default, he is liable to punishment, if he returns to Switzerland. Circular of Jan. 8, 1901.

As in the case of Russia and Turkey, the United States is unable to make effective its legal claim to the citizenship and exemption from military service of persons, natives of the countries mentioned in this second group, when they voluntarily return to their native country and place themselves within its jurisdiction. Nevertheless, upon proof of American naturalization, the Secretary of State almost uniformly instructs the diplomatic officers of the United States to intervene in behalf of such persons to relieve them of duties inconsistent with American citizenship. At times, these representations have succeeded in securing for these naturalized citizens a considerable measure of relief from obligations and incidental penalties growing out of their former allegiance. In the absence of treaty, however, compliance with such requests by foreign governments rests upon comity.

Under the head of dual nationality, we shall discuss the case of American-born sons of the nationals of countries which, like France, Italy, Switzerland and other countries, adopt the principle of *jus sanguinis* and claim the allegiance and the obligation to perform military service of the foreign-born sons of their nationals—France, Switzerland, and other non-treaty countries, regardless of the naturalization of the father.¹

§ 239. (C) Countries Which Have Concluded Naturalization Treaties with the United States.

A third category of countries embraces those which, while following the principles of the second class in their claims to military service, have limited their right to the services of their expatriated citizens by certain naturalization treaties. These countries recognize the doctrine of voluntary expatriation. The first of these naturalization treaties were the Bancroft treaties, concluded in 1868 with the North German Confederation, Bavaria, Baden, Würtemberg and Hesse.² They were followed by treaties with Belgium, Great Britain, Sweden and Norway, Austria-Hungary and Denmark.³ In 1872 a treaty with

¹ *Infra*, p. 581.

² These treatises may be found in v. 15 and 16, Stat. L., in the Appendix to Van Dyne, *Naturalization*, and in Malloy's *Treaties*, 1910-1913.

³ These treaties were concluded between 1868 and 1872 and may be found in

Ecuador was concluded,¹ and in 1902 one with Haiti. The last European state to conclude a treaty was Portugal in 1908. Following the principles of the Pan-American convention signed at Rio de Janeiro, Aug. 13, 1906,² the United States concluded naturalization treaties with Peru (1907), with Honduras, Salvador, Nicaragua, Uruguay and Brazil (1908) and with Costa Rica (1911).

There are two guiding principles in these treaties aside from the important stipulation recognizing the change of allegiance of a subject naturalized in the other country. These are the continued liability to punishment in the native state for offenses committed prior to emigration and the presumption of loss of citizenship by two years' continued residence in the country of origin. This latter principle, first expressed in the Bancroft treaties of 1868, has been finally incorporated into the Act of March 2, 1907, § 2.

In practically all the treaties, except the one with Great Britain and the recent ones with the Latin-American countries, naturalization and five years' residence in the United States are required as conditions necessary to the recognition of a change of allegiance. In the remaining treaties, voluntary naturalization alone is a sufficient basis for such recognition.

By the naturalization treaties, these countries recognize the American naturalization of their former nationals, subject, in case of the emigrant's return to his old country, to his punishment for offenses committed prior to emigration,³ particularly the evasion of an existing or accrued liability to military service. But he is protected against the exaction of what at the time of emigration was merely a future liability to serve.⁴

The classes of offenses arising out of emigration, under the military laws of the continental countries, for which a naturalized American citi-

v. 16 and 17, Stat. L. and in other sources above mentioned. A treaty of 1868 with Mexico was denounced by Mexico in 1882.

¹ This treaty was abrogated by the government of Ecuador, August 25, 1892.

² Convention between the U. S. and other powers. Status of naturalized citizens, signed at Rio de Janeiro, August 13, 1906. Treaty series, No. 575.

³ Unless the right to punish has been lost by lapse of time as provided by law. The treaties generally provide that the act of emigration itself is not punishable.

⁴ Westlake, *op. cit.*, I, 231.

zen may, upon his return to his native country, be arrested and punished, are set out in the law of Austria-Hungary as follows: (1) If he was accepted and enrolled as a recruit in the army before the date of emigration, although he had not been put in service; (2) if he was a soldier when he emigrated, either in active service or on leave of absence; (3) if he was summoned by notice or by proclamation before his emigration to serve in the reserve or militia and failed to obey the call; (4) if he emigrated after war had broken out.¹ The penalty for such violation of the law is either fine, imprisonment or the compulsory accomplishment of the defaulted military service, sometimes for an additional period as a penalty. The law varies from country to country.²

§ 240. Germany and Austria-Hungary.

With regard to Germany, the naturalization treaties have received an interpretation which warrants special notice. The treaties with the German States, with the exception of that with Baden, provide that a renewal of residence in the native country without the intent to return to the United States shall be construed as a renunciation of American naturalization, and that this intent not to return may be held to exist when the residence exceeds two years in duration. The German authorities have construed this renunciation as practically equivalent to a reacquisition of German nationality,³ and have

¹ Circular notice, Austria-Hungary, May 15, 1912, *For. Rel.*, 1910, p. 70; Belgium, Oct. 14, 1913; Denmark, April 29, 1913; Germany, March 29, 1912; Norway, Feb. 9, 1901; Sweden, Feb. 9, 1901; Portugal, July 18, 1910. The military law varies from country to country but the general offenses of the Austro-Hungarian law are typical of most European countries.

² The Circular notices issued by the Dept. of State for each of the important countries requiring military service present in brief form the scope of the obligation to military service, the punishable offenses and in a general way, the penalties involved, and the effect of the naturalization treaty, if any, between the U. S. and the country in question. Diplomatic correspondence relating to the operation of the naturalization treaties with the more important countries with which they have been concluded may be found in *Moore's Dig.* III, §§ 390-399.

³ With the exception of Bavaria. The treaty with Bavaria expressly provides that by renewal of native residence the individual does not recover his native citizenship. The German authorities, at least, have claimed that it subjected the person who had thus resumed his native residence for two years to the obligations of military service, although they admitted that legally he had not become repatriated in Germany. *For. Rel.*, 1885, 393, 399, 417.

even made this construction applicable to the minor children of returned naturalized citizens who resided in Germany over two years, notwithstanding the birth of such children in the United States. When such minor children reached the military age, they were called upon to perform military service. As this gave rise to vigorous remonstrance by the United States, which was not successful in affording relief in all cases, Germany, with a view to avoid the unpleasant situation which developed, adopted the expedient of expelling such minor children from the country, instead of requiring military service.

Again, while the treaties insure the immunity from military service of naturalized citizens of German origin who emigrated before they were seventeen years old, the German government, nevertheless, claims and exercises the right of expelling such persons on the presumption that they left Germany in order to evade military service, and that their permanent residence in Germany is contrary to the public welfare. The United States has unsuccessfully remonstrated against this practice of expulsion.¹

Inasmuch as Alsace-Lorraine became a part of Germany since our naturalization treaties with the other German States were negotiated, American citizens, natives of that province, may be held liable to military service or fine for evasion, on return, notwithstanding their naturalization. Such persons are informed² that they may be subjected to inconvenience and possible detention by the German authorities if they return without having sought and obtained permission to do so from the imperial Governor at Strassburg. Germany has never admitted the somewhat specious argument of the United States that the Bancroft treaties covered Alsace-Lorraine and thus far a new treaty specifically including that province has not yet been negotiated.³

The Austro-Hungarian treaty contains no provision by which a

¹ The diplomatic correspondence relating to the practice of expulsion of naturalized citizens from Germany is set out at considerable length in Moore's Dig. III, § 393. The position of the returning German is briefly stated in the circular notice of March 29, 1912. See also Webster, P., *Citizenship*, pp. 228-230, and annual volumes of *For. Rel.*, s. V°. Germany.

² Circular notice, March 29, 1912, Germany.

³ See Moore's Dig. III, § 392; *For. Rel.*, 1906, 648-653; 1907, I, 511.

renunciation of American naturalization is presumed from a residence of more than two years in Austria-Hungary. Thus it has happened that many subjects of that country, after obtaining naturalization in the United States, return to their native country intending to live there permanently, and invoke their American citizenship when called upon to fulfill military duty. This abuse of naturalization papers induced the government of Austria-Hungary in 1899,¹ in 1909,² and on other occasions to suggest an amendment or abrogation of the treaty. Since 1907, there is less ground for objections to the treaty than theretofore, since by the Act of March 2, 1907, the presumption of expatriation of a naturalized citizen arises after two years' residence in the country of origin. The United States has not objected to the expulsion by Austro-Hungarian authorities of naturalized citizens who, by boasting of their immunity from service in their native communities, are considered detrimental to the public welfare.³ The United States has, however, generally demanded that the "pernicious character of the returning person should be affirmatively shown in justification of the extreme resort to expulsion."⁴

§ 241. Renunciation of Naturalization.

It has been recognized from an early period of our history that naturalization may be renounced and protection forfeited by acts inconsistent with the retention of American citizenship. This fact was first prominently illustrated by the frequency with which natives of other countries have become naturalized here for the purpose of returning to their homes or seeking a residence in third countries with the benefit of American protection. The Executive, therefore, had early to deal with the case of persons who had been naturalized in the United States, not with any real intention of permanent residence in this country, but for the purpose of availing themselves of the advantages of citizenship while evading its obligations by continuous or

¹ For. Rel., 1899, pp. 79-80.

² For. Rel., 1909, 35.

³ Moore's Dig. III, § 399. See also For. Rel., 1887, 1894 and 1900, s. V^o., Austria-Hungary, and *supra*, p. 53.

⁴ Mr. Hay, Sec'y of State, to Mr. Herdliska, July 9, 1901, For. Rel., 1901, p. 10; Message of President McKinley, Dec. 3, 1900, For. Rel., 1900, xvi.

prolonged residence abroad. Apart from the provisions in the few naturalization treaties that had been concluded, the Executive had, up to the Act of March 2, 1907, no guide by which to determine how great a period of foreign residence entailed a forfeiture of American naturalization and protection. The rule followed was to establish, if possible, the *intent* of the person to maintain his American citizenship by returning to the United States; and to determine this intent not merely residence abroad for a prolonged period was an element to be considered, but all the attendant circumstances of the residence abroad, *e. g.*, whether it was for purposes of health, education, in representation of American business houses, or whether it indicated a complete abandonment of American citizenship.¹

Evidence of the absence of an intent to return to the United States is established by various tests. By all but a few ² of the naturalization treaties concluded by the United States, the reestablishment of residence in the native country with the intent not to return to the United States is equivalent to a renunciation of American citizenship, and two years' residence in the native country may be regarded as evidence of an intent not to return to the United States. The only early treaty in which this two years' residence rule is declared to raise a rebuttable presumption of expatriation is the one with Ecuador, but the United States has regarded the residence merely as a presumption, as a rule of evidence, in the case of all the other treaties in which the provision as to two years' residence is found.³ The German states, however, appear to have considered it as a conclusive rule, and declared the American citizenship forfeited by mere residence, without affording any opportunity to show an intent to return. In the more recent treaties of the United States, which include treaties with several of the Latin-American states, it has been expressly declared that the

¹ These questions will be considered more fully under the head of expatriation, *infra*, § 324 *et seq.* For the practice in the matter of renunciation of naturalization prior to 1906, see Moore's Dig. III, §§ 470-474.

² Those with Belgium, Baden, Austria-Hungary and Great Britain are the exceptions.

³ *I. e.*, with the North-German Union, Hesse, Württemberg, Bavaria, Denmark, Norway and Sweden. See the comparison of the treaties as made by Webster, P. *op. cit.*, 175-176, and Secretary Bayard's view as expressed in an instruction to Mr. Cox, Nov. 28, 1885, For. Rel., 1885, pp. 885, 889.

presumption may be rebutted by evidence to the contrary. Moreover, it is to be noted that such foreign residence does not repatriate the naturalized citizen in his native land,¹ but merely raises a presumption that his American naturalization has been renounced.

In the case of all countries, in order to justify diplomatic protection or the issuance of a passport, it must be shown that there is in good faith an intention to return to the United States. This has been the rule before and after the Act of 1907. Registration is one of the best methods of manifesting the necessary intent to return. Evidence of the absence of an intent to return, prior to 1907, was in many cases difficult to secure. Of course foreign naturalization or taking preliminary steps thereto, voluntary entrance into the civil or military service of another government, express renunciation or acts amounting thereto are clearly to be regarded as evidence of the absence of an intent to return. Usually, however, the intent has had to be inferred from various attendant circumstances and in weighing these, prolonged residence abroad has been perhaps more decisive than any other single factor.²

§ 242. Act of March 2, 1907.

Under the new rule established by the Act of March 2, 1907, when a naturalized citizen leaves this country instead of residing in it, two years' residence in the country of his origin or five years' residence in any other country creates a presumption of renunciation of the citizenship acquired here, and unless that presumption is rebutted by showing some special and temporary reason for the change of resi-

¹ See, however, the convention signed at Rio de Janeiro by various American states, August 13, 1906, which the United States ratified January 13, 1908. Treaty series, 575. It is there provided that "If a citizen, a native of any of the countries signing the present convention, and naturalized in another, shall again take up his residence in his native country without the intention of returning to the country in which he has been naturalized, he will be considered as having reassumed his original citizenship, and as having renounced the citizenship acquired by the said naturalization." An account of the countries which have ratified the Convention and its status in various other countries is printed in 5 R. D. I. privé (1911), 472-473. See the Venezuelan law of May 24, 1913, § 7.

² Many cases in which long residence abroad has been held to create a presumption of renunciation of citizenship may be found in Moore's Dig. III, §§ 470, 471, and 475.

dence, the obligation of protection by the United States is deemed to be ended. The presumption may be overcome by showing that the person concerned is residing abroad principally as a representative of American trade and commerce, or that he is residing abroad for health or education, and in all these cases intends to return to the United States permanently to reside, or that he has been prevented by some unforeseen and controlling exigency from returning and intends to return upon the removal of the preventing cause.¹

The meaning of the statute was for some time in doubt. It is now agreed, however, that it is intended to furnish a definite rule for determining when protection shall be withdrawn from naturalized citizens residing abroad, and that the presumption as to expatriation which is raised by the foreign residence never becomes conclusive, but is rebutted by a voluntary return to this country to reside permanently.² The Act for the first time supplies a clear statutory sanction for the withdrawal of protection from that large class of false citizens who acquire American citizenship not with the intention to reside in the United States and assume the duties of citizenship, but for the purpose of residing abroad and using their American naturalization as a cloak to escape the performance of obligations in their native or other countries.

DOMICIL AS CONFERRING NATIONAL CHARACTER

§ 243. Domicil and Nationality.

It has been observed that in the period of history when people were principally attached to the soil, before nations and nationality in their modern sense became distinct political and legal concepts, domicil, or the permanent home, was the test and criterion of status, civil and political.³ With the rise of the modern state in Europe, however, nationality became the test of civil and political status. This rule

¹ Circular of April 19, 1907, Expatriation, pp. 2-3, For. Rel., 1907, I, 3.

² Gossin's case, 28 Op. Atty. Gen. 504, For. Rel., 1910, 420. Department of State circular, December 22, 1910. Where the return is involuntary, as by deportation from abroad, the presumption is not rebutted. Akulin's case in Russia, Op. Atty. Gen., July 3, 1914. The statute (§ 2) is not retroactive, Department circular, July 21, 1910. See a valuable article by Richard Flournoy, Jr., Chief of the Bureau of Citizenship, Department of State, 8 A. J. I. L. (1914), 477, 481-484.

³ *Supra*, p. 24.

is adopted at the present time in practically all the countries of continental Europe, the principle having received renewed stimulus through the Italian school of Mancini. In England and the United States, however, domicile has retained practically all its importance as the test of the civil status of the person, and nationality or citizenship has become the test of political status.¹

Domicile is the place where a person resides as his permanent home with the fixed intention of constantly remaining there, to which, whenever he is absent, he has the intention of returning.²

Much confusion has arisen as to the true relation between domicile and national character by reason of three different factors: first, the occasional expression of executive opinion to the effect that domicile in the United States confers upon the person domiciled a national character as American and the right to American protection—a view expressed by Secretary Marcy in the Koszta case—and that permanent residence or domicile abroad of an American citizen amounts to a voluntary renunciation of American citizenship and the right to diplomatic protection, or indeed, that it constitutes an act of expatriation;³ secondly, the universal rule of American and English courts in matters of prize law to the effect that the domicile of a merchant in belligerent or neutral territory, fixes the character of his property at sea as enemy or neutral, regardless of his national allegiance;⁴

¹ The question of domicile is almost entirely within the scope of the conflict of laws; hence it cannot be discussed here except in its relation to national character. Domicile is fully discussed in the works on the conflict of laws by Dicey (American notes by J. B. Moore, 1896; 2d English ed. 1908), Story (8th ed., 1883), Wharton (3d ed., 1905), and Minor (1901) and in the works on private international law by Bar (2d ed., Gillispie's trans., 1892), Foote (4th ed., 1914), Phillimore (v. 4 of his Commentaries, 3d ed., 1889), Savigny (2d ed., Guthrie's trans., 1880) and Westlake (5th ed., 1912). See also the special works on domicile by Dicey (1879), Phillimore (1847), Round (1861), Jacobs (1887), and Bentwich (1911).

² See the definitions of domicile by Phillimore, Story and Wharton quoted by Moore in the Digest III, 813. The Roman law definition of domicile was very similar. See Ortolan, Generalization of Roman law, 573, cited by Morse, *op. cit.*, 93. See also Guier v. Daniel, 1 Binney, 349; Medina v. Costa Rica, Moore's Arb. 2587 and Flutie v. Venezuela, Ralston, 38, 43.

³ The Koszta case is discussed, *infra*, § 250. The effect of prolonged residence abroad, *infra*, § 324 *et seq.*

⁴ *Supra*, p. 110. This doctrine of trade domicile in war will be more fully discussed presently.

and thirdly, the rule that permanent residence of a person in belligerent territory subjects him and his property there situate to all the risks of war.¹

Influenced largely by one or the other of these doctrines the argument has occasionally been made that in the interpretation of protocols of arbitration of private claims the term "citizen" or "subject" must be understood in a so-called "larger" sense of international law, according to which all persons are "citizens" or "subjects" who by permanent domicile are within the protection of the government under which they reside, rather than in the strict sense of municipal law which construes the term as meaning absolute citizenship or paramount allegiance to a sovereign.² Such an argument has some support in certain *dicta* of the British Privy Council passing on appeals from awards of the Board of Commissioners under the treaty of 1814 between Great Britain and France,³ and in certain decisions of English common-law courts.⁴ The decisions of prize courts and other opinions to the effect that belligerent domicile impresses a certain national char-

¹ *Supra*, p. 251.

² This was the substance of Mr. Hale's argument before the British-American Claims Commission of May 8, 1871. His argument was rejected by the Commission. *Barclay (Gt. Brit.) v. U. S.*, Moore's Arb. 2727, Hale's Rep. 50. See also Brief of U. S. Solicitor in case of Jonas P. Levy, Sen. Misc. Doc. 251, 35th Cong., 1st sess. (v. 4), 13-15. See also Sec'y Marcy's celebrated argument in Koszta's case, particularly part found in Moore's Dig. III, 832.

³ In Drummond's case, 2 Knapp P. C. Rep. 295, the claim of a British subject against France was rejected on the ground that by French law he was also a French subject. This case, frequently cited to support Mr. Hale's argument, is therefore not in point. In Countess Conway's case (2 Knapp P. C. Rep. 364, 367), Baron Parke expressed the opinion, as *dictum*, that had the Countess been domiciled in England she would have been entitled to British protection. In Andre's case (2 Knapp P. C. Rep. 365, 368), not fully reported, it seems that claimant's domicile in England at the time of the confiscation of her property in France entitled her to British protection.

⁴ *Marryat v. Wilson* (1798), 8 T. R. (Durnford & East), 31, 45; 1 Bosanquet and Puller, 429, 443 (*dictum*); *McConnell v. Hector* (1802), 3 B. & P. 113 (British subject commercially domiciled in enemy territory, held disentitled to sue in British courts); *Tabbs v. Bendelack* (1802), 3 B. & P. 207, note (commercial domicile of American citizen in Great Britain affected him with character of British subject); *Bell v. Reid* (1813), Maule & Selwyn, 726, 733 (British subject relieved from penalties of illicit trade with Great Britain's enemy, Denmark, by reason of his domicile in a neutral country, the United States); *Albrecth v. Sussman* (1813), 2 Ves. & Beam. 323.

acter upon the property of the person so domiciled and for belligerent purposes temporarily suspends his paramount allegiance have occasionally been erroneously cited in support of a contention that for civil purposes and in time of peace domicile conferred national character.¹ The language of some decisions, unless understood as having relation only to trade domicile in time of war, is indeed calculated to mislead.² The misinterpreted declarations of Secretary of State Marcy in *Kosztka's* case,³ to the effect that domicile plus a declaration of intention conferred a right to American protection, led the commissioners of the American-Mexican commission under the protocol of July 4, 1868—until Thornton became the umpire—to hold that domicile in the United States combined with a declaration of intention conferred American citizenship and protection.⁴

§ 244. Domicil Neither Confers nor Forfeits Citizenship.

The better rule and the one which, apart from the special matter of belligerent domicile, has been practically uniformly adopted is that domicile neither confers nor forfeits citizenship.⁵ This is believed to be the correct principle, notwithstanding the executive declaration to the effect that the establishment of a domicile abroad with the intention of not returning to the United States may be construed as

¹ Kent appears to have fallen into this error (1 Commentaries, 78, 79), and Sec'y Marcy in *Kosztka's* case relied largely upon Kent, Moore's Dig. III, 832. Cockburn correctly, it is believed, considers this position "altogether inadmissible." *Nationality*, 203, 204.

² *E. g.*, *The Pizarro*, 2 Wheat. 227, to the effect that by the law of nations, a person domiciled in a country, and enjoying the protection of its sovereign is deemed a subject of that country. See also the *Charming Betsey*, 2 Cranch, 64.

³ *Infra*, §§ 250, 251.

⁴ *Jarr & Hurst (U. S.) v. Mexico*, Moore's Arb. 2707 and the cases following in Moore's Arb. Mr. Ashton's brilliant, if somewhat specious argument (*ibid.* 2708) appears to have led the American commissioner, Mr. Wadsworth, into the error. Thornton declined to consider a declaration of intention or domicile, singly or together, as conferring citizenship. *Wilkinson (U. S.) v. Mexico*, *ibid.* 2720.

⁵ See Mr. Ashton's able argument in *De Leon v. Mexico*, No. 593, July 4, 1868, v. III, 392-405; IV, 50-51 paraphrased in Moore's Arb. 2696-2706. See also *Adlam (Gt. Brit.) v. U. S.*, May 8, 1871, *ibid.* 2552; *Barclay*, *ibid.* 2721, 2728; *Wilkinson*, *ibid.* 3736. See also *Lem Moon Sing v. U. S.* (1895), 158 U. S. 538, 547; *Lau Ow Bew v. U. S.*, 144 U. S. 47, 62; *Fong Yue Ting v. U. S.*, 149 U. S. 698, 724, and *infra*, p. 690.

an act of voluntary expatriation,¹ for in these cases the foreign domicile is only one of the tests by which the intent to renounce American citizenship is determined.

§ 245. Belligerent Domicil.

Reference has already been made² to the Anglo-American doctrine of belligerent or commercial domicile, which differs from civil domicile in that it does not require residence with the intention to establish a permanent home, but merely establishment, not necessarily permanent, with the intention to engage in business. Actual physical residence of the owner is not even required to affect property with the political character of the country in which the house of trade whence the property originates is established.³ The unfortunate use of the word "domicil" in relation to two concepts so different as civil and commercial domicile has contributed to the confusion surrounding the effects upon national character of a foreign commercial residence. The rule as to commercial domicile adopted by English and American courts must be understood as furnishing a criterion to determine the political character—enemy, friendly, or neutral—of private property at sea in time of war.⁴ In other words, the property of a merchant acquires the political character of the nation in which he carries on his trade.

It is also a rule of the Anglo-American system, applied particularly to partnership property, that while residence in a neutral country will not protect a merchant's share in a house established in the enemy's country,⁵ residence in the enemy's country will condemn his share

¹ *Infra*, p. 690.

² *Supra*, pp. 110, 253.

³ See Dicey's definition of commercial belligerent domicile *supra*, p. 254 and references to articles on trade domicile in war by Baty, Bentwich and Westlake, *supra*, p. 111, note. See also references to works by Schuster, Trotter, and Page, cited *supra*, p. 253. See also Story's definition and reasoning in the *San José Indiano*, 2 Gallis. 268, 286, and Lord Lindley in *Janson v. Driefontein Cons. Mines* [1902], 484, 505.

⁴ See decisions of municipal courts quoted, paraphrased, and cited in Moore's Dig. VII, § 1189; Wharton's Dig. III, § 352; Duer on Marine insurance, 524–528.

⁵ The *Friendschaft*, 4 Wheat. 105; The *San José Indiano*, 2 Gall. 268; The *Cheshire*, 3 Wall. 231; The *William Bagaley*, 5 Wall. 377; Moore's Dig. VII, § 1192.

in a house established in a neutral country.¹ The lack of reciprocity in this rule indicates the partiality of the Anglo-American system for the rights of captors. Even if owned by a loyal citizen of the country of the captors, property emanating from enemy territory bears the impress of enemy character.²

The distinction between civil and commercial domicile, and the special effects of commercial domicile upon property in time of war, make it clear that the same individual, in reference to different transactions, may sustain, during the same period of time, two different, and even opposite, national characters.³

When a neutral merchant, resident in neutral territory, is habitually engaged in a trade with a country which, by the outbreak of war, becomes hostile, he has been allowed a reasonable time to withdraw from the trade without subjecting his goods to confiscation.⁴ As observed by Sir William Scott in *The Indian Chief*,⁵ "the character that is gained by residence ceases by non-residence. It is an adventitious character which no longer adheres to him from the moment he puts himself in motion *bona fide* to quit the country *sine animo revertendi*." Where a neutral, however, was domiciled in belligerent territory and did not actually carry out his intention to depart until a year after the outbreak of war, the Supreme Court of the United States declined to relax the rule, and condemned the property of American citizens who had been caught by the outbreak of war in 1812 with a commercial domicile in England, notwithstanding the manifestation of their desire to return to the United States.⁶ Chief Jus-

¹ Dana's *Wheaton*, § 335; *Westlake*, II, 141-142 (1907 ed.); *Oppenheim*, II, §§ 88, 90; *Bentwich*, 142; *Duer on Marine insurance*, §§ 42, 45; *The Antonia Johanna* (1816), 1 *Wheaton*, 159.

² *The Gray Jacket*, 5 Wall. 342; *The Venus*, 8 Cranch, 253; *The Frances*, 8 Cranch, 335.

³ *The Jonge Klassima*, 5 C. Rob. 302; *Janson v. Driefontein Consolidated Mines* (1902), A. C. 505, 506.

⁴ *The Jacobus Johannes* and the *Ospray*, cited by Sir William Scott (Lord Stowell) in the *Vigilantia*, 1 Rob. 14. See *Duer*, *op. cit.*, § 42.

⁵ 3 Rob. 12, 20. See also *U. S. v. Guillon*, 11 How. 45, 60; *The Frances*, 8 Cranch, 335, 366.

⁶ *The Venus*, 8 Cranch, 253. The property condemned was shipped before the outbreak of war.

tice Marshall's dissent ¹ from this decision on the ground that a neutral merchant should have a reasonable time to withdraw from a country and a trade which has suddenly become hostile, has had the approval of Chancellor Kent and of other authorities, and has been followed by the courts.²

§ 246. Effect of Domicil before International Tribunals.

The Anglo-American doctrine as to trade domicil in war in its relation to national character has been followed by international and domestic commissions acting under protocols of arbitration.³ International commissions, however, have not always confined the rule to its limited application to property at sea for purposes of prize law, but have at times extended the effects of foreign domicil so as to confer national character for civil purposes. Thus, in the case of *Raborg v. Peru*,⁴ the commission adopted the language of Kent to the effect that "if a person goes into a foreign country and engages in trade

¹ *The Venus*, 8 Cranch, 315.

² *The Gerasimo*, 11 Moore P. C. 88, 96 (*dictum*); *The Ariel*, 11 Moore, P. C. 119; *The Gray Jacket*, 5 Wall. 342; *The William Bagaley*, 5 Wall. 377; Westlake, II, 144-145; Wharton, III, 344-345. Eleven months was considered too long a time for the withdrawal of property to escape condemnation. *The St. Lawrence*, 9 Cranch, 120.

³ Claims of American citizens who had established houses of commerce with foreigners in France, England, or other foreign countries were excluded from the benefits of the treaty of April 30, 1803 between the U. S. and France, art. V., Malloy I, 514. See Rules of decision of commission distributing French indemnity of 1803, Moore's Arb. 4442, 4445. The board of commissioners under the treaty of July 4, 1831 with France confined the rule that trade domicil is the criterion of citizenship "strictly to matters of prize law," and did not extend its application further. Kane's Notes, 1836, p. 18, Moore's Arb. 4471-72. See also *The Pizarro*, 2 Wheat. 228; *Murray v. Charming Betsey*, 2 Cranch, 120.

The general rule was followed in *Prats (Mexico) v. U. S.*, July 4, 1868, Moore's Arb. 2890, Ferrer, *ibid.* 2721 (*dictum*); *Carmalt (Gt. Brit.) v. U. S.*, May 8, 1871, *ibid.* 3157; *Rodocanochi Sons & Co. v. U. S.*, Act of June 23, 1874, Distribution of Geneva Award, *ibid.* 2359.

In the *Betsey (U. S.) v. Great Britain*, Nov. 19, 1794, Moore's Arb. 2825, 2853 the general rule was admitted, but the purely temporary presence of the owner in enemy territory was not considered a commercial or enemy domicil so as to affect his property at sea with enemy character. To the effect that temporary residence is not domicil see *Beales (U. S.) v. Mexico*, Act of March 3, 1849, *ibid.* 2670 (*dictum*).

⁴ *Raborg (U. S.) v. Peru*, Jan. 12, 1863, Moore's Arb. 1614 (*dictum*); Upham, American commissioner, in the Laurent case, relied upon Kent's statement, *ibid.* 2678. See also *Finn (U. S.) v. Venezuela*, Dec. 5, 1885. *ibid.* 2348-2349 (*dictum*).

there, he is by the law of nations to be considered a merchant of that country, and a subject to all civil purposes,"¹ and deprived the claimant of his standing as an American citizen for the enforcement of a contract with the government of Peru by reason of his commercial establishment in Peru.

The rule was similarly extended beyond its ordinary application to the belligerent capture of property at sea in the cases of *Laurent* and of *Uhde* (*Great Britain v. U. S.*) before the mixed commission under the convention of February 8, 1853.² Both these claimants, British subjects by birth, had established a commercial domicile in Mexico and had remained in Mexico after the outbreak of the war between the United States and Mexico in 1846. The claim of the Laurents was based upon the seizure by General Scott of certain moneys which the Laurents had placed in a bank to the credit of the Mexican government, said money having been the purchase price of certain church property which the Mexican government had confiscated and contracted to sell to the claimants. The claim of Messrs. Uhde was based upon an alleged wrongful seizure by the United States authorities at Matamoras, a port then held by the United States forces, of certain merchandise alleged to have been introduced by a fraudulent evasion of the customs regulations. In both cases, the question was raised as to the right of the claimants to appear before the commission as British subjects. Bates, the umpire of the commission, relying upon certain decisions of English courts to the effect that commercial domicile in time of war impresses the national character of the domicile upon property at sea connected with the place of domicile, held that the claimants, by reason of their commercial domicile in Mexico, could not be considered "British subjects" within the meaning of the convention, and that the commission was without jurisdiction.³

¹ See Abdy's *Kent*, 2d ed., 1878, p. 195. Kent here had reference solely to commercial domicile in enemy territory in prize law.

² *Laurent (Gt. Brit.) v. U. S.*, Feb. 8, 1853, Moore's Arb. 2671-2691, S. Ex. Doc. 103, 34th Cong., 1st sess., 120-160; *Uhde (Gt. Brit.) v. U. S.*, *ibid.* 2691-2695, S. Ex. Doc. 103, 34th Cong., 1st sess., 436 *et seq.*

³ Moore's Arb. 2689, 2695. Upham, the American commissioner, wrote a long opinion (2677-2683) also denying the jurisdiction of the commission on the ground of lack of citizenship.

In the Uhde case, however, jurisdiction was assumed on the ground that the United States in its diplomatic correspondence with Great Britain had entertained the claim.

Mr. Bates was not a lawyer, and it is believed that he misconceived the doctrine of trade domicile in war by applying it to the situation of the claimants Laurent and Uhde. Mere commercial domicile in Mexico should not have been considered as involving a loss of British nationality. The conclusion in both cases was probably correct, but for entirely different reasons than the ones advanced. It was not the domicile of the claimants in Mexico which affected their national character as British subjects, but it was the transactions in which they were engaged which in the one case did, and in the other did not, deprive them of the right to British protection. By purchasing property from Mexico and depositing money in trust for the Mexican government, the Messrs. Laurent had rendered assistance to one of the belligerents, and as against the United States, had forfeited their neutrality as British subjects and their right to British protection. By introducing cargo into a port in the possession of the United States the Messrs. Uhde did not, as against the United States, forfeit their right to British protection, whatever might have been the consequences as against Mexico.¹ On these grounds, which appeal to the lawyer as more logical and reasonable than the principle of commercial belligerent domicile, the Laurent and the Uhde decisions may be reconciled.

Trade domicile in war, therefore, it is submitted, does not deprive a citizen of his nationality, nor confer upon him the nationality of his domicile. For the particular purpose of belligerent capture of property at sea, it serves to impute the national character of the domicile upon so much of a merchant's property as is connected with his commercial domicile, and to this limited extent only, suspends the rights growing out of his actual political allegiance.

The effect of the domicile of a neutral alien in enemy territory upon his rights of person and property has also led to erroneous conclusions as to the effect of domicile upon national character. In our discussion

¹ See the valuable criticisms of the Laurent and Uhde decisions in the doctrinal notes on these cases in Lapradelle and Politis' *Recueil*, I, 675, 680.

of war claims, it was observed that neutral aliens and even citizens domiciled in an enemy state, with their property there situated, are exposed to the risks of war and the consequences of hostilities to the same extent as subjects of the enemy.¹ A citizen of a neutral nation, residing in a country between which and another war breaks out may exempt himself from the liabilities incident to hostile character by taking early steps to remove from the belligerent territory.² By continuing his residence in the belligerent territory he may be considered to owe at least temporary allegiance and to have elected to adhere to the sovereign of his domicile of choice, and to have placed himself out of the protection of the government to which his original and permanent allegiance is due.³ His person and property may be treated by the other belligerent as the person and property of an enemy.⁴

While such domicile in belligerent territory involves a temporary allegiance and imposes upon the individual the rights and liabilities, for belligerent purposes, of a national of the country in which he is domiciled, he does not thereby become a citizen of that country, nor lose his citizenship in his home state, although he is deemed by his continued domicile in the belligerent territory, to have impliedly renounced his right to the diplomatic protection of his home government for all purposes connected with his belligerent domicile. The right of continued residence of aliens is often provided for in treaties,

¹ *Supra*, p. 251, notes 1, 2 and p. 252, note 1. See also *U. S. v. Farragut*, 22 Wall. 406; *The Wm. Bagaley v. U. S.*, 5 Wall. 377; *Prize cases*, 2 Black, 635; *Page v. U. S.*, 11 Wall. 268; *Green v. U. S.*, 10 Ct. Cl. 466 (exception in case of Abandoned or Captured Property Act); *Haycraft v. U. S.*, 22 Wall. 81; *Lamar v. Browne*, 92 U. S. 187; *Young v. U. S.*, 97 U. S. 39; *Jaragua Iron Co. v. U. S.*, 212 U. S. 297, 306; *Peter N. Paillet v. U. S.*, Ct. Cl. Rep. 220, 36th Cong., 1st sess., 19-20.

² *The Wm. Bagaley v. U. S.*, 5 Wall. 377; *Gates v. Goodloe*, 101 U. S. 612; *Clow (U. S.) v. Mexico*, Domestic commission, Act of March 3, 1849, *Moore's Arb.* 2657.

³ *Clow (U. S.) v. Mexico*, Act of March 3, 1849, *Moore's Arb.* 2657, 2658; *Cooke (U. S.) v. Mexico*, *ibid.* 2659, 2660; *Haggerty et al. (U. S.) v. Mexico*, *ibid.* 2663; *Thompson (U. S.) v. Mexico*, *ibid.* 2667.

⁴ *Cooke (U. S.) v. Mexico*, Act of March 3, 1849, *ibid.* 2659, 2661; *Haggerty et al. (U. S.) v. Mexico*, *ibid.* 2665; *Thompson (U. S.) v. Mexico*, *ibid.* 2669; *Barclay (Gt. Brit.) v. U. S.*, May 8, 1871, *ibid.* 2727 (*dictum*); *Laurent (Gt. Brit.) v. U. S.*, Feb. 8, 1853, *ibid.* 2671 and *Uhde (Gt. Brit.) v. U. S.*, *ibid.* 2691 (see also *supra*, p. 562, note 2). *Prats (Mexico) v. U. S.*, July 4, 1868, *ibid.* 2886, 2890 (*dictum*). See also *supra*, p. 252, note 1.

and their subjection to war risks by reason of continued domicile should not be extended beyond its ordinary application to belligerent acts.

In some countries, the fact of being domiciled for a certain period confers the rights of citizenship, if not citizenship itself.¹ This rule might with advantage be generally adopted by states which entertain habitually large numbers of permanently domiciled foreigners. It would furnish something in the nature of a solution for the problem which confronts the national government of such foreigners who, although permanently absent and fulfilling none of the duties of citizenship, nevertheless demand diplomatic protection when they get into difficulties.

EFFECT OF DECLARATION OF INTENTION TO BECOME A CITIZEN

§ 247. International Effects.

Under the naturalization laws of the United States, an alien who desires to become a citizen of the United States must, at least two years prior to his admission to citizenship, declare on oath before the clerk of an authorized court that it is his intention to become a citizen of the United States and to renounce forever all other allegiance.² The few exceptions to the requirement of a declaration of intention as a condition of admission to citizenship are not important.³

¹ Cockburn, Nationality, 203, 204.

² Formerly § 2165, R. S., now § 4, paragraph 1 of Act of June 29, 1906, 34 Stat. L. 596.

³ In case of honorably discharged soldiers, § 2166 R. S. Honorable discharge from Navy after five years' service, Act of July 26, 1894, 28 Stat. L. 124. Honorable discharge after four years' service in Navy, Marine Corps, Revenue-Cutter Service, etc., Act of June 30, 1914, Session laws, 63rd Cong., 2nd sess., pt. I, 395. Widow and children of declarant who dies before final naturalization, Act of June 29, 1906, § 4, Parag. 6. In Hawaii only five years' residence is required, Act of April 30, 1900, 31 Stat. L. 161. By § 30 of the Act of June 29, 1906 inhabitants of the Philippines or other insular possessions need not renounce foreign allegiance. By the Act of June 25, 1910 (36 Stat. L. 830), a person who has resided in the U. S. for five years next preceding May 1, 1910 and acted under the impression that he was a citizen and exercised the rights of citizenship may receive a certificate of naturalization, without making a declaration of intention. *In re Urdang*, 212 Fed. 557. The "minor's clause" (§ 2167, R. S.) was repealed by the Act of June 29, 1906. See Van Dyne, Naturalization, 61-64.

The utility and desirability of the declaration of intention have often been questioned, and because of its apparent uselessness and of the difficulties which it engenders its elimination from our naturalization laws has more than once been recommended.¹ Its purpose was once explained by Secretary Blaine as providing "a probationary period during which the applicant, by residence in the land of his adoption, by acquiring interests therein, by good moral conduct, and by familiarizing himself with, and attaching himself to, its constitutional methods, shall fit himself for a faithful and loyal assumption of the duties of citizenship and thus, as a member of our free society, support the government whose protection is in return extended to him."²

The anomalous position in which the person who has thus acquired what might be termed "inchoate citizenship" is placed, has caused many diplomatic controversies between the United States and other governments and has served at times to deprive the person concerned of the protection of both his old and his new government.

While the declaration of intention serves to confer upon an alien various rights in the states of this country,³ occasionally denominated as state citizenship, it has been held uniformly by our courts and by the executive department of the government that the declaration is merely an expression of intention or purpose, and has not the effect either of naturalization or citizenship in the United States⁴ or of expatriation from the country to which the applicant owes original alle-

¹ *E. g.*, Report of Naturalization Commission, 1905, p. 12.

² Mr. Blaine to Mr. Hicks, May 8, 1890, For. Rel., 1890, 695.

³ In twelve states it gives the alien the right to vote, provided he has resided in the state for a certain period. In several states he enjoys greater rights than other aliens in the acquisition of real property, and in some states he may be employed on public works and other aliens may not. He also enjoys privileges under the preemption and homestead laws. Van Dyne, Naturalization, 64; H. Doc. 326, 59th Cong., 2nd sess., 20; Nathan Wolfman in 41 Amer. L. Rev. (1907), 504.

⁴ *Lanz v. Randall*, 4 Dill. 425; *In re Moses*, 83 Fed. 995; *Minneapolis v. Reum*, 56 Fed. 576, 6 C. C. A. 31; *Frick v. Lewis*, 195 Fed. 693, 697; *U. S. v. Uhl*, 211 Fed. 628, 631, and cases cited in 41 Amer. L. Rev. 505 and Dicey, Conflict of laws (Amer. ed.), 202. See also *Johnson v. U. S.*, 160 U. S. 546; *Yerke v. U. S.*, 173 U. S. 439. See instructions of Secretaries Buchanan, Fish, Frelinghuysen, and Bayard in Moore's Dig. III, 337-340. See also Sec'y Olney to Mr. Denby, Jan. 13, 1897, For. Rel., 1896, 92; Sec'y Hay to Mr. McKinney, March 20, 1899, MS. Dom. Let. 544-546.

giance.¹ This principle has been confirmed by naturalization treaties concluded by the United States with foreign countries² and by the decisions of arbitral tribunals.³

§ 248. Anomalous Position of Declarant.

While the principle is, therefore, clear that a declaration of intention does not confer citizenship, the position of such an alien declarant when abroad is not free from doubt. Legally, he has not abjured his original allegiance, and he remains a national of the country of his origin until his naturalization has been completed. This has been reiterated, as has been observed, by various secretaries of State and is made clear by numerous treaties.⁴ Nevertheless, having clearly ex-

¹ Mr. Hay, Sec'y of State, to Mr. Conger, Feb. 15, 1902, For. Rel., 1902, 221; Mr. Cass, Sec'y of State, to Mr. Washburne, March 9, 1857, Moore's Dig. III, 338; Mr. Frelinghuysen to Mr. Dunne, July 31, 1883, *ibid.* 339; Mr. Bayard to Mr. West, Oct. 17, 1885, *ibid.* 341; Mr. Blaine to Mr. Hicks, Feb. 26, 1890, *ibid.* 341.

Adlam (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 2552, Hale's Rep. 14; Tousig's case, Cockburn, 123. Citation of opinion by Lieber in Wilson (U. S.) v. Chile, Aug. 7, 1892, Moore's Arb. 2555. The argument of the American commissioners in the case of Santangelo (U. S.) v. Mexico, April 11, 1839, *ibid.* 2550, to the effect that the declaration of intention constituted a renunciation of original allegiance is clearly wrong.

In the case of France, however, the declaration of intention was held in one case to serve as evidence of an intent not to return to France, which constituted a presumption of expatriation under the French Civil Code. Bouillotte (France) v. U. S., Jan. 15, 1880, Moore's Arb. 2652. But to the effect that the French code contemplates the acquisition of a new citizenship before French citizenship can be lost, see M. Flourens, French minister of foreign affairs, as reported by Mr. McLane, June 25, 1887, For. Rel., 1887. See also as to French law before 1889, circular printed in Moore's Arb. 2653-2654.

² The particular provision generally reads: "The declaration of intention to become a citizen . . . has not for either party the effect of naturalization." It is included, in substance, in the treaties with Bavaria, Baden, North German Confederation, Württemberg, Hesse, Austria-Hungary, Sweden and Norway, Haiti, Honduras, Brazil, Costa Rica and Nicaragua. It was also included in the treaties with Ecuador and Mexico, now abrogated.

³ Santangelo (U. S.) v. Mexico, April 11, 1839, Moore's Arb. 2549; Beales (U. S.) v. Mexico, Act of Congress, March 3, 1849, *ibid.* 2670; Ehlers (U. S.) v. Mexico, March 3, 1849, *ibid.* 2551; Ryder (U. S.) v. China, Nov. 8, 1858, *ibid.* 2332; Elliott (U. S.) v. Mexico, July 4, 1868, *ibid.* 2481 (*dictum*); Gros (U. S.) v. Mexico, *ibid.* 2772; Perez (U. S.) v. Mexico, *ibid.* 2718 (*dictum*); Adlam (Gt. Brit.) v. U. S., May 8, 1871, *ibid.* 2553, Hale's Rep., 14; Wilson (U. S.) v. Chile, Aug. 7, 1892, *ibid.* 2553, 2557.

⁴ *Supra*, p. 566, and note 2, *Supra*.

pressed his intention to sever the tie which binds him to his country, it is a question whether he is entitled, when abroad, to the protection of that country. The United States, on one or two occasions sought—without success, it would seem—to resist the right of Italy to protect certain Italian subjects, the victims of mob violence, who had declared their intention of becoming citizens of the United States.¹ Germany withdrew its protection from a German in Nicaragua, who, it was found, had declared his intention of becoming a citizen of the United States.² Before the French-American mixed commission under the convention of January 15, 1880, the declaration of intention was held to be *prima facie* proof of the absence of an intent to return (“*sans esprit de retour*”) to France, and under the French code, a presumption of expatriation.³ Cockburn is emphatically of the opinion that a person who has declared his intention has, during the probationary period preceding his final naturalization, no claim to the protection of his home government.⁴

§ 249. Protection of “Declarants.”

In the matter of protection abroad, the United States appears from a comparatively early period to have recognized that a declarant who manifests a *bona fide* intention to complete his naturalization and reside in the United States is in a somewhat different position, at least in a third country, than an ordinary alien.⁵ A limited protection

¹ See quotations from diplomatic correspondence in certain mob violence cases, printed in For. Rel., 1895 and 1896, and reprinted in Moore's Dig. III, 344-353.

² Claim of George A. K. Morris *v.* Nicaragua, Mr. Jas. P. Porter, Act'g Sec'y to Messrs. Kennedy and Shellabarger, Jan. 4, 1887, and previous correspondence in Sen. Doc. 287, 57th Cong., 1st sess., 10-22. See also Moore's Dig. VI, 633-634. As Mr. Morris had not yet become an American citizen, U. S. protection was also denied him.

³ Bouillotte (France) *v.* U. S., Jan. 15, 1880, Moore's Arb. 2652. See statement in Ryder (U. S.) *v.* China, Nov. 8, 1858, *ibid.* 2333, that when claimant first sued as British subject, his claim was rejected on the ground of his assumed American character.

⁴ Cockburn, Nationality, 202. See also J. Hubley Ashton's argument before U. S.-Mexican commission of 1868, Moore's Arb. 2701.

⁵ See also *infra*, p. 569. Attention has already been called (*supra*, p. 476) to the privileged position of seamen on American vessels who have declared their intention. After three years' service, following the declaration, they may be admitted to citizen-

has in some instances been extended to such persons, and as has already been observed,¹ passports were issued to them for a short time during the Civil War, and are now issued, under the authority of the Act of March 2, 1907, to those who have declared their intention and have resided in the United States for three years. They are issued only under special circumstances,² are valid for six months only and in their issuance the Department of State has adhered to its uniform rule that a person who has declared his intention will not be protected in his native country.³ In China⁴ and Mohammedan and semibarbarous countries,⁵ the declaration of intention, it has been suggested by one or two secretaries of State, may sustain an appeal to the good offices of the diplomatic representative of the United States.

The limited protection which is thus extended in third countries to those who, under certain circumstances, have declared their intention to become citizens of the United States is based upon the realization of their awkward position in being practically unable to look for protection to the government of which they are still nationals, by reason of their declared intention to renounce allegiance to it, and in not yet having acquired the complete right to American protection.⁶ It has always been sought to guard against imposition on the United States. On numerous occasions the departure from the United States of a person who had declared his intention, followed by an extended residence or domicile abroad has been construed as an abandonment

ship; and immediately after filing the declaration, they are deemed American citizens for purposes of protection. R. S., § 2174.

¹ *Supra*, p. 501.

² Rules of the Dept. of State governing issuance of passports to "declarants," Nov. 14, 1913. The subject is discussed at greater length, *supra*, p. 501.

³ Mr. Olney, Sec'y of State, to Mr. Breckenridge, Jan. 27, 1896, Moore's Dig. III, 343 and other instructions there cited. The rule is confirmed by the naturalization treaties cited *supra*, p. 567. See also Wharton, II, § 175.

⁴ Mr. Olney, Sec'y of State, to Mr. Denby, Jan. 13, 1897, For. Rel., 1896, 92. But not, said Mr. Olney, if the person was a citizen of a country with which the U. S. had a naturalization treaty, thus excluding such action.

⁵ Mr. Cass, Sec'y of State, to Mr. de Leon, Aug. 18, 1858, Wharton, II, § 175, p. 359.

⁶ See the discussion of the Citizenship Board, H. Doc. 326, 59th Cong., 2nd sess., 21. The board's recommendation as to declarant's passports was carried out in section one of the Act of March 2, 1907.

of his intention to become a citizen.¹ As a condition precedent to the issuance of the declarant's passport as authorized by the Act of 1907, it must be shown by the applicant, among other things, that a special and imperative exigency requires his temporary absence and that there has been no neglect in his failure to complete his naturalization.² During the present European War, the issuance of "declarants' passports" to natives of the belligerent countries has been completely suspended, and they are issued to natives of other countries with reluctance only.

DOMICIL PLUS DECLARATION OF INTENTION

§ 250. Koszta's Case.

Reference has been made³ to the confusion engendered by the arguments of Secretary of State Marcy in sustaining the right of the United States to protect Martin Koszta, in so far as they relate to the effect of domicile and a declaration of intention upon the right to American protection.⁴ The reasoning and the *dicta* of Mr. Marcy subsequently led other secretaries of State to assert rather wide claims of American protection based upon domicile and declaration of intention, but Mr. Marcy's statements must be understood as applying only to the case of Koszta then under discussion, and it may be added that the Department of State has in recent years confined Mr. Marcy's

¹ Mr. Marcy, Sec'y of State, to Mr. Fay, March 22, 1856, Moore's Dig. III, 337; Mr. Blaine, Sec'y of State, to Mr. Hicks, May 8, 1890, For. Rel., 1890, 695; Mr. Hay, Sec'y of State, to Mr. Conger, Feb. 15, 1902, For. Rel., 1902, 222. See citations to instructions of Secretaries Marcy and Bayard in *Wilson (U. S.) v. Chile*, Aug. 7, 1892, Moore's Arb. 2555. See also *Perez (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2718; *Kern (U. S.) v. Mexico*, *ibid.* 2719 and cases cited, p. 2720.

² See the rules issued November 14, 1913, in which other special conditions which must be fulfilled, are set forth.

³ *Supra*, p. 556.

⁴ The case is fully presented, with the notes printed at length, in Moore's Dig. III, § 490; S. Ex. Doc. 1, 33rd Cong., 1st sess.; 44 St. Pap. 961 *et seq.* See also Wharton, II, §§ 175, 198; Cockburn, 118-122; Lawrence's Wheaton (2nd ed. 1863), 176, 229; Hall, 5th ed., 242; Morse, *op. cit.*, 6, 70; Moore, American diplomacy (New York, 1905), 194-199; Wolfman in 41 Amer. Law Rev. 509. We shall confine our statement of the Koszta case to the facts which relate to the questions of citizenship and protection.

somewhat extreme position to the peculiar circumstances under which it originated.

In brief, the facts were that Koszta, a Hungarian by birth, fled Austria after the rebellion of 1848 and escaped to Turkey. Turkey having declined Austria's demand for his extradition, he was released by Turkey on the understanding that he would leave Turkey and not return. This appears to have been with Austria's consent. Coming to the United States, he made a declaration of intention to become a citizen, and after a residence of somewhat less than two years, returned to Turkey on alleged private business. He placed himself under the protection of the American consul at Smyrna, and received a *tezkereh*, or local protection paper. While at Smyrna, awaiting an opportunity to return to the United States, he was arrested under violent circumstances by Austrian authorities claiming to have the right to arrest him under the capitulations between Austria and Turkey. The arrest was made without the authority and over the refusal of permission of the Turkish governor. Koszta was taken on board an Austrian war-vessel and confined in irons. The demand of the American consul and chargé for his release having been refused, an American war-vessel in the harbor threatened to sink the Austrian ship unless Koszta was at once delivered up. As a compromise, Koszta was turned over to the French consul until the matter could be settled by the two governments concerned, and in the end Koszta was sent to the United States, Austria reserving the right to proceed against him should he return to Turkey.

Secretary Marcy's argument in support of the right of the United States to protect Koszta¹ was based upon several grounds, the most important of which were: (1) that the seizure of Koszta having taken place within the jurisdiction of a third power, the respective rights of Austria and the United States were to be determined, not by the municipal law of either country, but by international law; (2) that although Austria claimed him as its subject he had been practically banished when he left Turkey, by agreement, with Austria's consent,

¹ The argument is set out in full in Mr. Marcy to Mr. Hülsemann, Sept. 26, 1853, H. Ex. Doc. 1 and S. Ex. Doc. 1, 33rd Cong., 1st sess. See also Moore's Dig. III, 824-834.

and that he was, even by Austrian law, no longer an Austrian subject; (3) that Austria's seizure could not be justified under her treaties with Turkey or international law, Turkey having expressly refused permission to make the arrest; (4) that among the special grounds which sustained the right of the United States, under international law, to protect Koszta were: (a), the fact, that although not a citizen under the municipal laws of the United States, he had by virtue of his domicil and declaration of intention to become a citizen, acquired, in international law, a national character as American; and (b), even if this were not so, he had, by placing himself under the extraterritorial protection of the American consul at Smyrna, become invested with the nationality of the United States.

§ 251. Erroneous Interpretations.

Mr. Marcy's contentions in the Koszta case led to various erroneous interpretations and constructions and misconceptions of law, some of which, even up to recent years, have resulted in some confusion of thought. It was, for example, assumed that a declaration of intention may be considered as conferring an American character and a right to diplomatic protection in a third country. Mr. Marcy's own firm denial of any such construction of his statements has not altogether served to cause its abandonment. In fact, it will be recalled that the Act of March 2, 1907, confers a right to issue a limited passport, under certain special circumstances, to declarants.¹ Apart from this special case, a mere declarant has no claim of right to American protection,² and in recent years when an attempt has been made to found a claim to American protection in a third country upon a declaration of intention, the Department has replied:

"The somewhat extreme position taken by Mr. Marcy in the Koszta case, that the declarant is followed during sojourn in a third country by the protection of this Government,³ has since been necessarily re-

¹ *Supra*, p. 501. In every other case, the passport is as firmly refused to a declarant as it is to any other alien.

² The extension of good offices has on one or two occasions been authorized in countries in which the U. S. exercises extraterritoriality. *Supra*, p. 569.

³ This is not an accurate statement of Mr. Marcy's position, for he considered the declaration of intention and domicil together, and regarded the former as evidence of the latter.

garded as applying particularly to the peculiar circumstances in which it originated, and to relate to the protection of such a declarant in a third country against arbitrary seizure by the Government of the country of his origin.”¹

Again, it was for some time supposed that Secretary Marcy considered a domiciled alien entitled abroad to the protection accorded a citizen, on the ground that when resident in the United States such domiciled alien owed temporary allegiance to and was entitled to local protection by the United States. While this erroneous belief was short-lived, traces of it may be discovered in positions assumed by the Department of State at various times attributing some vague title to special protection abroad to the fact of domicile in the United States, especially when accompanied by a declaration of intention. President Cleveland, in 1885, even made a recommendation to Congress that the rights of such persons should be defined by statute.² Based upon an opinion by Dr. Wharton, Solicitor for the Department of State, to the effect that certain civil rights attaching to domicile are entitled to international recognition, Secretary Bayard in 1885 instructed the diplomatic officers of the United States that persons domiciled in the United States, although not naturalized, are entitled “to maintain internationally their status of domicile, and to claim protection from this government, in the maintenance of such status.”³ For several years thereafter instructions were issued in several cases extending a vague degree of protection to persons domiciled in the United States, who, having declared their intention to become citizens, were temporarily abroad.⁴ Fortunately, this peculiar confusion between domicile and nationality was of comparatively short duration, and Secretary Bayard himself became convinced that his instruction afforded no satisfactory rule of action.⁵ In the revision of the instructions to diplomatic officers in 1897 the reference to domicile was omitted. Finally, there is evidence that Secretary Marcy himself regarded

¹ Mr. Olney, Sec’y of State, to Mr. Denby, Jan. 15, 1897, For. Rel., 1896, 92-93. Reaffirmed by Mr. Hay, Sec’y of State, to Mr. McKinney, March 20, 1899, MS. Dom. Let. 544-546.

² Congress took no action upon the recommendation. Moore’s Dig. III, 846.

³ Printed personal instructions to diplomatic agents, § 118.

⁴ Burnato’s and King’s cases, Moore’s Dig. III, 847-850.

⁵ See Baron Scillière’s case in France, For. Rel., 1887, 303 *et seq.*

his expressions as to the effect of domicile and declaration of intention upon national character as *dicta*, inasmuch as his position in the Koszta case rested principally upon the fact that Koszta had placed himself under the protection of an American consul in Turkey, according to the recognized usage in that country.¹ International law sanctions the right of protection thus acquired, and to this extent, the position of Mr. Marcy has had general approval.² Much doubt, then, may be said to exist as to whether the protection extended in Koszta's case in Turkey would have been extended in *any* third country, as has sometimes been asserted. Moreover, it seems certain, according to Secretary Marcy's own instructions in D'Oench's and in Tousig's case,³ that such protection would not have been extended had Koszta voluntarily returned to Austria and placed himself within the jurisdiction of its municipal laws. This is simply in line with the general rule that even American naturalization will not protect a citizen on return to his native land from penalties incurred there prior to his emigration.

§ 252. Decisions of United States-Mexican Commission of 1868.

We may not leave this subject without referring to certain decisions of the United States-Mexican commission of 1868, in which proof of domicile in the United States plus a declaration of intention at the time of the origin of the claim was held a sufficient title to admission to standing before the commission as a "citizen" of the United States, provided that subsequently to the origin of the claim, the claimant has completed his naturalization.⁴

¹ Sec'y Marcy to Mr. Marsh, Aug. 26, 1853, Moore's Dig. III, 835-836; Lawrence's Wheaton (2nd ed., 1863), 230.

² Lawrence's Wheaton (2nd ed., 1863), 230; Morse, *op. cit.*, 6, 70, 244; Calvo, cited by Morse, 70; Woolsey, cited by Hall (5th ed.), 243; Webster, *op. cit.*, 143. See Westlake's view, I (1904 ed.), 201. Mr. Marcy's position has also been defended on the ground that Turkey's evident inability to protect Koszta against Austria's violent and unlawful aggression warranted the United States in intervening.

³ Moore's Dig. III, 838. See also Marcy's note to Baron de Kalb, July 20, 1855. *ibid.* 841, and Mr. Davis' instruction, May 12, 1869, *ibid.* 843. See also 54 St. Pap. 467 and Cockburn, *op. cit.*, 123-124.

⁴ Jarr and Hurst (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2707, where claimants were domiciled in U. S., had declared their intention, had shipped as seamen

When Sir Edward Thornton became umpire of the commission he declined to follow the peculiar rule of these decisions, but acted upon the principle that neither a declaration of intention nor domicile, singly or together, could confer citizenship.¹ This principle was adopted by other commissions.²

DUAL NATIONALITY

§ 253. Manner in which it Arises.

By the municipal law of the United States all persons born in this country of alien parents are citizens of the United States. This government also recognizes, as well as adopts, on its own part, the rule that children born abroad of citizens are themselves citizens of the country to which the parents owe allegiance. There arises, therefore, by reason of the concurrent operation of the *jus soli* and the *jus sanguinis*, a conflict of citizenship, spoken of usually as dual allegiance. Inasmuch as each state may determine for itself the methods for acquiring and on an American vessel, and after the injury, had completed naturalization. The decision was largely influenced, it is believed, by J. Hubley Ashton's ingenious argument, *ibid.* 2708. The decision may be considered *dictum*, as the claim was dismissed as having been previously settled. Palacio, commissioner, held that the claim to protection "should be essentially attached to [claimant's] real and actual presence" in the U. S. In *Gosch (U. S.) v. Mexico*, *ibid.* 2715, Umpire Lieber reluctantly held, following the Jarr and Hurst cases, that a son whose father made a declaration of intention when the son was sixteen, but had completed naturalization only after the son's majority, the son having lived in Mexico before he became of age and up to the date of the injury out of which the claim arose, was entitled to an award as a "citizen of the U. S." This must be considered another poor decision of Dr. Lieber, for he failed apparently to understand the limitations set by Palacio upon the Jarr decision. See also *Sprotto, Assignee of Hellman, v. Mexico*, *ibid.* 2715, 2717, and *Eigendorff v. Mexico*, *ibid.* 2717. In *Schreck v. Mexico*, the claim was dismissed as claimant had apparently not established his domicile in the U. S. when the claim arose, *ibid.* 2720. When the naturalization was not shown to have been completed, however, the claim was dismissed for lack of citizenship. *Perez v. Mexico*, *ibid.* 2718; *Kern v. Mexico*, *ibid.* 2719 and cases cited, 2720.

¹ *Milatovitch (U. S.) v. Mexico*, No. 395, MS. Op. IV, 350-351; *Wilkinson (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 2720; *Gros v. Mexico*, *ibid.* 2771, 2772; *Zamacoña, Palacio's successor as Mexican commissioner*, seems to have acted on the same principle, *ibid.* 2720.

² *Beales (U. S.) v. Mexico*, Domestic commission, Act of March 3, 1849, *Moore's Arb.* 2669; *Rojas (U. S.) v. Spain*, Feb. 12, 1871, *ibid.* 2337; *Wilson (U. S.) v. Chile*, Aug. 7, 1892, *ibid.* 2553. See also as to nugatory effect on citizenship of a mere declaration of intention, *supra*, p. 566.

conserving its nationality, and as most states have adopted some form of the *jus soli* as well as some form of the *jus sanguinis*, these conflicts of citizenship at birth are frequent, although they are somewhat tempered by the fact that most countries admit that the child endowed with dual nationality must, upon reaching majority, make an election of citizenship.

Dual allegiance is sometimes considered to exist when a person born in one country becomes naturalized in a foreign country before the bond of original nationality has been broken. So far as the United States is concerned, to regard a duly naturalized American citizen as subject to a dual allegiance would imply a denial of the doctrine of voluntary expatriation, as maintained by the United States. It has already been observed,¹ however, that practically all the countries of Europe (except so far as they have limited their right by naturalization treaties) assert the right to determine whether and upon what conditions they will release their subjects from the bond of allegiance;² and while the United States contends that a duly naturalized citizen has but one nationality, it is often unable successfully to maintain its position in the country of origin or in a third country. Nevertheless, it remains true that when a person acquires a new nationality before his old one has been validly set aside and is so recognized by his original state, conflicting claims to his allegiance will arise. The new German law of nationality of 1913 apparently sanctions such conflicts by providing that a German residing in a foreign country may acquire naturalization therein without giving up his German nationality unless the laws of that country (as is the case in the United States) require the renunciation of the prior allegiance.³ Such a con-

¹ *Supra*, p. 534.

² The countries have been classified, *supra*, § 237 *et seq.* See also Fromageot, H., *De la double nationalité*, Paris, 1892, 61 *et seq.*, and Samana, N., *Contributo allo studio della doppia cittadinanza nei riguardi del movimento migratorio*, Firenze, 1910.

³ Sec. 25, parag. 2 of the law of July 22, 1913 (R. G. Bl. 583). See R. W. Flournoy, Jr., in 8 A. J. I. L. (July, 1914), 480 and Th. Meyer, *Reichs- u., Staatsangehörigkeitsgesetz vom 22 Juli, 1913*, Berlin, 1913, p. 168. While residing in one country, it is presumed that such a person cannot call upon the other for protection. The power to retain German nationality applies to cases in which the German secures foreign nationality either against his will or for specific economic reasons, *e. g.*, to own or inherit real property, etc.

flict also arises between countries in which the naturalization of the father extends to his wife and minor children, *e. g.*, Austria-Hungary, Switzerland, Germany, Norway, Great Britain and the United States and countries which regard naturalization as of individual effect only, *e. g.*, Argentine, Brazil, Venezuela (with limitations), Greece, Russia, and Portugal. France curiously gives a collective effect to naturalization in France and an individual effect only to naturalization of a Frenchman abroad.¹ Inasmuch as international law provides no rules governing naturalization, the effect of naturalization upon previous citizenship must be left, it would seem, to the municipal law of the states concerned.²

§ 254. The Jus Soli.

The system of the *jus soli* has some variations. In its most absolute form it ascribes citizenship to the child born on the national territory, whatever the nationality of the parents. This principle has been adopted by the United States, Argentine, Venezuela, Chile, Bolivia, Brazil, Peru, Ecuador, Uruguay, Paraguay, Haiti and San Domingo.³ In a less rigorous form, leaving the individual free at his majority to elect the nationality of his father, Great Britain, Portugal and Mexico adhere to this system. Other countries, such as France, Denmark, Holland, Guatemala, Costa Rica and Ecuador appear to regard the individual as having ceased to be their national if at majority he was not domiciled in the territory. Some countries limit the application of the *jus soli* to the children of *domiciled* parents, *e. g.*, Colombia and the Netherlands, and under certain limitations, France and Italy. France even provided in the law of 1889 that the father had to be born in the territory.⁴

¹ Fromageot, *op. cit.*, 75-77; For. Rel., 1910, 515. France has concluded with certain states, *e. g.*, Switzerland and Belgium, treaties conferring on minors affected a right of election of nationality at majority.

² See Oppenheim, I, 359.

³ Citations to constitutional and statutory provisions in Fromageot, *op. cit.*, 27, 28 and Lehr, *La nationalité*, Paris, 1909. As to Latin-America, see Harmodio Arias, *Nationality and naturalization in Latin-America* in 11 Journ. of the Soc. of Comp. Leg. (1910), 126-142.

⁴ Fromageot, *op. cit.*, 30.

§ 255. The *Jus Sanguinis*.

Practically all the countries of Europe, and several of the states of Latin-America have adopted the system of the *jus sanguinis*.¹ In some states, *e. g.*, Bolivia, Chile, Colombia and San Domingo the application of the *jus sanguinis* to the foreign-born children of nationals is made dependent upon the return of the child to the mother country; in Portugal and Argentine a mere election of citizenship, and in Venezuela, of domicil, suffices. In Great Britain, the foreign-born child of a British subject may, at majority, renounce his British nationality,² whereas in the United States, the title of a foreign-born child of American parents to American citizenship is dependent upon the prior residence of the father in the United States.³

§ 256. Methods of Avoiding Conflicts.

It is not within the province of this work to resolve the difficulties of private international law to which dual allegiance gives rise in cases in which the national law of the individual is to be applied. It may be said merely that either the *lex fori* or the law of the domicil is often used by municipal courts as a criterion in choosing between conflicting nationalities.⁴ Nor need we deal with the theories of some publicists, *e. g.*, Püttlingen, Unger, Bar and Laurent,⁵ who deny the theoretical possibility of plural nationality for, however logical it may be, their theory is effectively refuted by the facts of positive law. More-

¹ Fromageot, *op. cit.*, 51 *et seq.*

² 33 Vict. c. 14, § 4, Declaration of alienage. This provision is retained in § 14 of the recent Nationality and Status of Aliens Act, 4 and 5 Geo. 5, ch. 17.

³ R. S., § 1993; Van Dyne, Citizenship, 33, 34. While the statute merely provides that "the rights of citizenship shall not descend to children whose fathers never resided in the United States," it would seem from the word "descend" that the residence must have preceded the birth of the child, and it is so construed by the Department of State.

⁴ See Weiss, A., *Traité . . . de droit international privé*, 2nd ed., Paris, 1907, 304 *et seq.*; Fromageot, *op. cit.*, 107-108. See also Ernö Wittmann, *Conflits des lois concernant la nationalité*, in 23rd Report (1906) of the International Law Assn., 211-230; Boeck in 20 R. G. D. I. P. (1913), 335-349 and Rostworowski in *Annales de l'école des sciences politiques*, 1898, 193.

⁵ Fromageot, *op. cit.*, 16-17, with citations to the works of these writers. See also Morse, Citizenship, 103-105 and argument of Mr. Morse before Spanish Claims Commission of 1871, Moore's *Arb.* 2612-2613; Westlake, *Private international law*, 4th ed., 1905, p. 356.

over, it is admitted that municipal law has exclusive territorial but no obligatory extraterritorial force, so that states with conflicting claims to the allegiance of a particular individual are, in the absence of treaty, constrained to yield to the municipal law of the state having actual jurisdiction of the person. Great Britain, in its diplomatic practice, appears to adhere firmly to what may be called the general rule that no state protects its nationals residing in the territory of another state which also lays claim to their allegiance, whether by *jus soli*, *jus sanguinis*, or naturalization.¹ Within certain limitations, Germany² and the United States follow this practice.³ Several countries, either as to all matters, or as to special matters, such as military service, have concluded treaties by which the conflicts of their national law are adjusted.⁴ In the matter of naturalization, some countries such as Switzerland, Luxemburg, Norway and Sweden avoid conflicts by requiring proof of capacity to become naturalized according to the

¹ See *Drummond's case*, 2 Knapp P. C. 295; Cockburn, *op. cit.*, 106; Foote, J., *Foreign and domestic law*, 3rd ed., London, 1904, 29; *For. Rel.*, 1907, II, 921; Fromageot, *op. cit.*, 83-84; De Lapradelle, G., *De la nationalité d'origine*, Paris, 1893, 349. See *Wilson v. Marryat*, 8 T. R. 31, 45.

It has been observed that Great Britain by statute (Naturalization Act, 1870, § 7) declines to protect its naturalized subject against his state of origin, when the latter still claims his allegiance (*supra*, p. 543), although the recent British Nationality and Status of Aliens Act appears to omit such a provision. Italy does not apparently adhere strictly to the general rule. See *Vicini claim v. Dominican Republic*, 1914; *Arata (Italy) v. Peru*, Nov. 25, 1899, Descamps & Renault, *Rec. int. des traités du xx^e siècle*, 1901, p. 709; and the correspondence between the Venezuelan government and the Italian Minister at Caracas, 1873, set out in *Libro Amarillo*, 1907, p. 214.

² Koenig, B. W., *Handbuch des deutschen Konsular-wesen*, 7th ed., Berlin, 1910, pp. 56, 197. For practice of some other countries, see Cahn, *Staatsangehörigkeit*, Berlin, 1908, p. 32 a.

³ Italy does not appear to observe the general rule (*e. g.*, *Vicini claim v. Dominican Rep.* and *Canevaro claim v. Peru*, *infra*, p. 589); in one noteworthy case the U. S. appears to have made an exception to its general practice. In the claim of *Mrs. Groce and children v. Nicaragua*, the U. S. demanded a heavy indemnity for the killing of Mr. Groce, on behalf of his native Nicaraguan widow and children, continuously there domiciled, who by Nicaraguan law were citizens of Nicaragua. *For. Rel.*, 1909, 446.

⁴ Thus Spain has concluded treaties with various states of Latin-America relinquishing her claim to the allegiance of natives of those states born of Spanish subjects. Fromageot, *op. cit.*, 97. France has concluded treaties regulating military service with Belgium and Spain. *Ibid.* 100, 105; Lapradelle, *op. cit.*, 31, 363-364.

applicant's national law. Other countries, among which the United States may be included, have by naturalization treaties succeeded to a considerable degree in adjusting conflicting claims to the allegiance of a naturalized citizen.¹

As already noted, dual allegiance may arise in the case of a child born in the United States of alien parents, and in the case of a child born abroad of American parents. The concurrent operation of the *jus sanguinis* and the *jus soli* upon such a child, as is often the case, serves to impose upon him dual nationality.²

§ 257. Protection Abroad in Cases of Dual Nationality.

According to the Fourteenth Amendment to the Constitution and under § 1992 of the Revised Statutes, a child born in the United States of alien parents—whether permanently or temporarily here resident, and whether themselves capable of acquiring citizenship or not—is a citizen of the United States.³ The question arises whether such a child upon his departure to and his long-continued residence in the country of his parents, which by its law considers him as its national *jure sanguinis*, may properly receive the protection of the United States. During minority, and in the absence of any conflicting claim to his allegiance or service by the country of his residence, the United States appears to have taken the position that in view of his incompetence to elect another nationality, he must be considered a citizen of the United States and as such entitled to the issuance of a passport.⁴ The case is quite different, however, when the country of residence demands some service from the individual so situated. Thus, it has frequently happened that children born in the United States of alien parents are taken at an early age to the latter's country of native allegiance and upon reaching the military age are called to military

¹ *Supra*, § 239.

² Van Dyne, *Citizenship*, 25 *et seq.*; Moore's Dig. III, §§ 426-430; Wharton II §§ 183-185.

³ See cases collected in report of Citizenship Board, H. Doc. 326, 59th Cong., 2nd sess., 73-74, and especially *U. S. v. Wong Kim Ark*, 169 U. S. 649.

⁴ Gundlich's case, Mr. Bacon, Act'g Sec'y to Mr. Tower, Amb. to Germany, March 8, 1907, For. Rel., 1907, 516-517. Unless, however, he returns to the United States upon reaching majority, or shortly thereafter, he is considered as having elected foreign nationality, and a further passport is declined.

duty. The United States recognizes the dual nationality of such children and would find it difficult to maintain a claim for their exemption from military service; indeed, the Department has stated that it may not properly be called upon to intervene in their behalf against the country in which they reside.¹ The right to American protection is in such cases considered as suspended during the minority and foreign residence of the child, but it may be revived upon the attainment of the child's majority, by his carrying out an election to return to the United States. The question of election will be examined presently.

The matter of protection abroad in cases of dual allegiance depends very largely upon the law of the foreign country in which the question arises, and upon the naturalization treaties which it may have concluded. Thus, in the case of countries which deny either absolutely or conditionally the right of voluntary expatriation, the American-born child of a native of such country, whether the father was naturalized or not in the United States, is subject upon his visit to such country to the obligations which native allegiance may impose upon him.²

In countries with which the United States has concluded naturalization treaties, conflicting claims to the allegiance of sons of naturalized citizens have occasionally occurred. By the laws of the United States the minor children of naturalized citizens, upon taking up permanent residence in the United States, become citizens thereof by virtue of the parent's naturalization.³ The question has arisen whether by return of the father to the native country for a sufficiently long time to involve a renunciation of his American citizenship, his minor children follow his status. Notwithstanding the general rule that an infant child partakes of the nationality of his father, the United States has

¹ Mr. Bayard, Sec'y of State, to Mr. Liebermann, July 9, 1886, Moore's Dig. III, 542; Liebmman's case, 1885; Blancafort's case, 1885; Steinkauler's case, 15 Op. Atty. Gen. 15. The ruling of the Dept. of State in Pinto's case, in which the American-born son of Costa Rican parents, taken back to Costa Rica when three years old, was considered apparently as an American citizen only, and not subject to dual allegiance, is exceptional. The misconception is discussed by Mr. Moore in his Digest, III, 535.

² Gendrot's case in France, For. Rel., 1888, I, 495-499; 1899, 269-271, Moore's Dig. III, 537-539; Dubuc's case in France, For. Rel., 1910, 514-516; Reinhard's case in Switzerland, 1914.

³ Act of March 2, 1907, § 5, 34 Stat. L. 1229.

considered that the father is legally unable to deprive the child of his natural allegiance and that the child's title to American protection is merely suspended during his minority and residence abroad until, upon reaching majority, he made a definite election of nationality.¹

§ 258. Foreign-born American Citizens.

According to § 1993 of the Revised Statutes "all children . . . born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

When such foreign-born children of American citizens are born in a country by whose laws they become its subjects *jure soli*, a case of dual nationality also arises.² While passports may be and are frequently issued to such foreign-born minors,³ their efficacy is qualified by the fact, unreservedly admitted, that it is not competent for the United States by its municipal legislation to interfere with the rights, obligations and duties which may attach to them under the laws of the country in which they were born and in which they continue to reside.⁴ In third countries no such limitation would apply.

¹ See Pierrepont, Atty. Gen., in Steinkauler's case, 15 Op. 15 and criticism by Morse, *op. cit.*, 104; Grimm's case, 1882. In Great Britain a more logical rule is followed. The minor child follows the status of the father, and with him, would cease to be a British subject. Within a year after attaining his majority, he may, however, make a declaration that he wishes to resume British nationality. See the recent Nationality and Status of Aliens Act, § 12 (2).

When the American-born child taken abroad at an early age returns to the United States during minority and remains here, the U. S. will resist any claim to his allegiance by the country of his father, where he resided during a part of his minority. Boisselier's case, Moore's Dig. III, 544; Revermann's case, *ibid.* III, 536.

² Moore's Dig. III, §§ 426-427; Wharton, § 185; Van Dyne, Citizenship, 34 *et seq.*

³ There is no uniform practice in the matter. See, however, Mr. Seward, Act'g Sec'y of State, to Mr. Foster, July 2, 1879, For. Rel., 1879, 815. Such minors may also be registered in American consulates. Mr. Rockhill to Mr. Williams, March 16, 1896, Van Dyne, 43.

⁴ Hoar, Atty. Gen., June 12, 1869, 13 Op. Atty. Gen. 89, 91; Mr. Bayard, Sec'y of State, to Mr. Vignaud, July 2, 1886, For. Rel., 1886, 303; Report of Sec'y Fish to the President, Aug. 25, 1873, For. Rel., 1873, II, 1191; Mr. Olney, Sec'y of State, to Mr. Strobel, June 4, 1896, For. Rel., 1896, 35, Moore's Dig. III, § 427; Van Dyne,

The question is frequently presented whether the foreign-born minor child of a naturalized citizen is entitled to American protection. If born prior to the naturalization of the father and never resident in this country, the child of course never became a citizen of this country. If born after the naturalization of the father, it becomes first necessary to determine whether the father had expatriated himself, at the time of the child's birth. If so, the child is born an alien, and is not entitled to American protection.¹ As already observed, if the father renounced or forfeited his American citizenship subsequent to the birth of the child and acquired a new nationality, this has been held to operate not as a renunciation, but merely as a suspension of the child's right to American protection against a conflicting claim of the country of residence, notwithstanding the general rule that the minor child follows the status of the father. A passport may be issued to such a child until he attains majority, and becomes competent to elect his nationality.² The American citizenship of such a minor may, however, be divested by his continued residence abroad after reaching the age of majority. So that, while protected as a minor, he must, in order to conserve his American citizenship and right to protection, manifest his election to assume the rights and duties of American citizenship, for upon reaching majority his citizenship is no longer derivative, but is a matter of personal election. When, therefore, the foreign-born child of an American citizen or the American-born child of foreign parents continues to reside abroad after reaching the age of majority, his right to American protection depends upon his having

op. cit., 35; Cons. Reg., 1896, § 138. The English law appears to be the same. Appendix to Report of Naturalization Board Commissioners, 1869, 60, 67; Cockburn, Nationality, 108-110; For. Rel., 1873, II, 1326. See also Lavigne, No. 11, and Bister, No. 20 (U. S.) *v.* Spain, Feb. 12, 1871, Moore's Arb. 2454.

¹ Sec'y Fish to the President, Aug. 25, 1873, For. Rel., 1873, II, 1191. See two instructions of Sec'y Frelinghuysen, 1883 and 1884 in Moore's Dig. III, 528, For. Rel., 1885, 396; Rosenheim's case, 1896, Sec'y Olney to Mr. Uhl, For. Rel., 1896, 215-220; Mr. Hay, Sec'y of State, to Mr. Tower, May 31, 1904, For. Rel., 1904, 314 Williams, Atty. Gen., in 14 Op. 295 (1873).

² Mr. Adee, Act'g Sec'y of State, to Mr. Combs, Sept. 15, 1903, For. Rel., 1903, 595; Same to Mr. Beaupré, Aug. 30, 1904, For. Rel., 1904, 36. See also Mr. Seward to Mr. Foster, Aug. 13, 1879, For. Rel., 1879, 824, and Hine's case, For. Rel., 1901, 421. The same rule would apply to the foreign-born sons of native citizens, who become expatriated after the birth of the child. For. Rel., 1893, 401-404.

elected American citizenship in accordance with the law of the United States.

§ 259. Right of Election.

The municipal law of many countries gives to the native-born child of foreign parents, affected with a dual nationality, a right of election of nationality upon reaching majority or within a reasonable time thereafter. Such, for example, is the law of France, Spain, Belgium, Greece, Italy, Portugal, Mexico, Chile and Costa Rica.¹ This principle, which is generally recognized in international law even in the absence of express provision of municipal law, is based upon the fact that when a person becomes *sui juris* he cannot logically retain two nationalities, and he is required to elect between them in order that he may be bound exclusively by the one or the other.² This election may be manifested in various ways. In some countries, *e. g.*, Portugal, Italy and France, silence operates as an election of domestic nationality; in other countries, as in Spain, it is construed as an election of the foreign nationality of the parents. While there is no express provision in the law of the United States giving election of citizenship to the child born here of alien parents, it has always been held by the Department of State that if such a child is taken during minority to the country of his parents, he must, upon arriving at majority or shortly thereafter, make his election between the citizenship which is his by birth and the citizenship which is his by parentage.³ In case such a person should elect American citizenship he must, unless in extraordinary circumstances, in order to render his election effective, manifest

¹ Brazilian Minister to Mr. Blaine, Sec'y of State, and Sec'y Blaine to Brazilian Minister, Dec. 2, 1890 (not sent). See also Van Dyne, *op. cit.*, 25. For Chile, see the opinion of the Court of Appeals at Santiago printed in *For. Rel.*, 1907, I, 124. For Portugal, see *For. Rel.*, 1910, 834. See Appendix to Report of Citizenship Board, 1906.

² See the cases in American courts collected by the Citizenship Board, H. Doc. 326, 59th Cong., 2nd sess., 74-76. The new German law of nationality of July 22, 1913 makes it expressly possible for an adult to possess two nationalities, *supra*, p. 576. A similar possibility is maintained by the Italian law of June 13, 1912, art. 7.

³ *De Bourry's case*, 2 Wharton, 401; *Steinkauler's case*, 15 Op. Atty. Gen. 15; *Surmann's case*, Mr. Olney, Sec'y of State, to Mr. Reichenau, Nov. 20, 1896, *For. Rel.*, 1897, 182; Van Dyne, 24-31.

and carry out in good faith an intention to return with all convenient speed to the United States and assume the duties of citizenship.¹

With respect to the foreign-born child of American citizens, the United States has adhered to the generally recognized principle of international law to the effect that the child upon reaching full age must elect one nationality, and repudiate the other, his election being final.² This election is required to be made within a "reasonable time" after reaching majority.³ On different occasions this government has declined to extend its protection to persons who had reached the age of twenty-four,⁴ and twenty-six,⁵ and had failed to elect United States citizenship. While the United States requires the foreign-born citizen upon majority to expressly manifest his election of American citizenship, the foreign-born child of Italian parents, a citizen of the country of his birth, retains his Italian nationality unless he expressly renounces it on attaining majority.⁶

The United States has held that the foreign-born child of an American citizen was not competent to make an election of his nationality during minority, and that his right to claim United States citizenship upon reaching majority could not be taken from him.⁷ It was this view of the status of such a child, it seems, which led to the enactment of that provision of the Act of March 2, 1907, which requires foreign-born American children who continue to reside outside the United States, in order to receive the protection of this government, to record at an American Consulate "upon reaching the age of eighteen," their

¹ Sec'y Bayard in For. Rel., 1886, 12 and 303 and For. Rel., 1887, 1131; For. Rel., 1888, I, 489 and 510.

² Wharton, Conflict of laws, § 10; *Ludlam v. Ludlam*, 26 N. Y. 356; Mr. Bayard, Sec'y of State, to Mr. Pendleton, April 27, 1886, For. Rel., 1886, 327; Van Dyne, *op. cit.*, 38. For decisions of municipal courts, see H. Doc. 326, 59th Cong., 2nd sess., 74 *et seq.*, 79-80; also Count Wall's case, 3 Knapp P. C. Rep. 13 and Jephson v. Riera, *ibid.* 130.

³ Sec'y Bayard in For. Rel., 1886, 327; Sec'y Frelinghuysen in Klengenmeyer's case, For. Rel., 1885, 398.

⁴ For. Rel., 1886, 12; *ibid.* 1887, 965-967.

⁵ For. Rel., 1903, 595.

⁶ Art. 7 of the Italian law of June 13, 1912, Parl. Pap., Cd. 6526, Misc. No. 1 (1913), p. 2.

⁷ For. Rel., 1879, 815 and 825; *ibid.* 1901, 421 (Hine's case); For. Rel., 1886, 317, 327 and Van Dyne, 47 (George's case).

intention to become residents and remain citizens of the United States and "to take the oath of allegiance to the United States upon attaining their majority."¹ This provision was the result of a recommendation of the Citizenship Board,² appointed in 1906. The recommendation, which was confined to male children, was based upon the ground that inasmuch as such children at eighteen generally become liable to military service in foreign countries, the United States might be put in the position of protecting a child of this class during the period of liability for military service, only to have him, upon attaining his majority, elect foreign nationality. It was realized that even the registration of intention would not entirely prevent such occurrences, but it was said that a young man thus violating his pledge would be "in danger of forfeiting not only his good name but the further protection of this government."³ The Department of State first construed the statute to permit of the registration or recording of intention up to arrival at the age of nineteen. Several cases occurred, however, where the foreign-born child had failed to record his intention before reaching nineteen, and in some cases it was believed that American citizenship had thereby been forfeited. In view of the admitted incapacity of an infant to make any election in regard to his citizenship, and in view of the practical certainty that Congress did not intend to deprive of his right to elect American citizenship one who failed to make the declaration of intention, the Department on March 14, 1911 issued a circular instruction to diplomatic and consular officers stating that the declarations of intention "to become residents and remain citizens of the United States" had reference to the right of protection rather than citizenship under municipal law, and that "such declarations may be made at any time after the minors concerned have reached the age of eighteen years and before they take the oath of allegiance to the United States."⁴ This conclusion was reached by

¹ Act of March 2, 1907, § 6, 34 Stat. L. 1229; Cons. Reg., parag. 138; Circular Instruction, Dept. of State, April 19, 1907, "Children of citizens born abroad," For. Rel., 1907, 9.

² H. Doc. 326, 59th Cong., 2nd sess., 17.

³ *Ibid.* 17.

⁴ General Instruction, Consular, No. 16, March 14, 1911, Declaration of foreign-born children required by section 6, Act of March 2, 1907. The function of the declaration has been practically nullified by this construction.

holding that the term "upon" [reaching the age of eighteen] signified "after," for which there is some authority. This same construction supports the ruling of the Department that the oath of allegiance may be taken within a reasonable time after attaining majority.

The election of American citizenship, it has been generally held, should be evidenced by coming to the United States to live, upon reaching majority or within a reasonable time thereafter. Should the foreign-born child come to the United States a considerable time after attaining the age of majority, without having taken the oath of allegiance, he would come as an alien.¹ The burden of proving an election of American citizenship falls upon the claimant thereof. Foreign nationality may be elected by silence or a mere continuation of residence abroad. Failure within a reasonable time to carry out the declaration of intention to reside in the United States would nullify the effect of the oath of allegiance as an election of American citizenship.

There are one or two interesting cases of dual nationality which may be mentioned. The child born of foreign parents on the high seas on an American vessel is probably an American citizen under our law² and may also be a foreign subject *jure sanguinis*. Hence he would upon attaining majority have a right of election.

The Institute of International Law at its Madrid session reached the conclusion that the nationality of an aeronaut follows the country in which he has been matriculated, but that state cannot protect the airship of an alien in his national state, if the latter forbids its nationals to register their airships abroad.³

§ 260. Decisions of International Tribunals of Arbitration.

International arbitral commissions have frequently had to pass upon questions of dual allegiance. Such cases have usually arisen under

¹ *Albany v. Derby* (1858), 30 Vermont, 718.

² Wheaton, 8th ed., § 106; Kent's Commentaries, I, 26; *Craps v. Kelly*, 16 Wall. 610; *McDonald v. Mallory*, 77 N. Y. 546; Vattel, § 216; Nelson, H., Private international law, 47, citing *Marshall v. Murgatroyd* (1870), L. R., 6 Q. B. 31. See also dissenting opinion of Story, J., in *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99, and *U. S. v. Gordon*, 5 Blatch. 18. There is an express provision to this effect in the 1914 British Nationality and Status of Aliens Act, § 1 (1, c.).

³ 24 *Annuaire* (1911), 346, 314-327; 7 R. D. I. privé (1911), 846.

protocols giving the commission jurisdiction of claims of citizens of one country against the other country, and the claimant has proved to be a citizen of each of the contracting parties according to the municipal law of each.

The principle generally followed has been that a person having dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal.¹ In other words, a person cannot sue his own government in an international court, nor can any other government claim on his behalf. This principle was well expressed by Frazer, Commissioner for the United States, in his opinion in Alexander's case:²

"The practice of nations in such cases is believed to be for their sovereign to leave the person who has embarrassed himself by assuming a double allegiance to the protection which he may find provided for him by the municipal laws of that other sovereign to whom he thus also owes allegiance. To treat his grievances against that other sovereign as subject of international concern would be to claim a jurisdiction paramount to that of the other nation of which he is also a subject. Complications would inevitably result, for no government would recognize the right of another to interfere thus in behalf of one whom it regarded as a subject of its own."³

In numerous cases international tribunals have endeavored to resolve the conflict of nationalities by applying various criteria to determine which of the two nationalities could more properly be attrib-

¹ Alexander (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 2529; Boyd (Gt. Brit.) v. U. S., *ibid.* 2465; Martin (U. S.) v. Mexico, July 4, 1868, *ibid.* 2467; Leuret (France) v. U. S., Jan. 15, 1880, *ibid.* 2488, 2492; Maninat (France) v. Venezuela, Feb. 19, 1902, S. Doc. 533, 59th Cong., 1st sess., 44, 74; Brignone (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 710, 718 (*dictum*). See also Drummond's case (Gt. Brit.) v. French Indemnity Commissioners, 2 Knapp's P. C. Rep. 295.

In Arata (Italy) v. Peru, Nov. 25, 1899, Descamps and Renault, Recueil int. des traités, I, 709, 711, Arbitrator Uribarri (Spain), contrary to the general rule, allowed a claim against Peru on the part of native Peruvian children of an Italian father, citizens of both countries. In Halley (Gt. Brit.) v. U. S. and Ferris (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 2239, the Commission (Frazer dissenting) made an award to the beneficiary (who possessed dual nationality) of an intestate who, however, was "exclusively a British subject."

² Alexander (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 2531.

³ It has been noted (*supra*, p. 460) that this is the general practice of the United States and Great Britain. See also Cogordan, La Nationalité, Paris, 1890, 39, and Tchernoff, *op. cit.*, 470.

uted to the claimant, it being admitted that without some proof or presumption of personal election the municipal law of one country could not be given superiority over the other. If, as a result of the application of these criteria, it appeared that the claimant had elected the citizenship or that he could properly be regarded as a citizen of the defendant country, the claim was dismissed for lack of jurisdiction.

The criterion most frequently applied has been domicile. In resolving the conflict of nationality, preference has been given to the citizenship of the country in which the claimant had established or maintained his or her domicile.¹ This continuation of domicile may be considered a form of election of nationality.

In case of conflict between the *jus soli*, where claimant has continued to reside, and the *jus sanguinis*, preference has almost uniformly been given to the former,² following in this respect the diplomatic practice.

¹ Lebreton (France) v. U. S., Jan. 15, 1880, Moore's Arb. 2488, 2505, Opinion of Commissioner Aldis; Hammer and Brissot (U. S.) v. Venezuela, Dec. 5, 1885, *ibid.* 2456-2461; Stevenson (Gt. Brit.) v. Venezuela, Feb. 13, 1903, Ralston, 438, 445; Miliani (Italy) v. Venezuela, Feb. 13, 1903, *ibid.* 754, 761; Brignone (Italy) v. Venezuela, *ibid.* 710, 719; Poggioli (Italy) v. Venezuela, *ibid.* 847, 866; Maninat (France) v. Venezuela, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 44, 74; Massiani (France) v. Venezuela, *ibid.* 211, 224; Canevaro (Italy) v. Peru, April 25, 1910, 6 A. J. I. L. (1912), 746, decided by Hague Court of Arbitration, May 3, 1912, 8 R. D. I. privé (1912), 331, Boeck in 20 R. G. D. I. P. (1913), 317, 329, and Ernst Zitelmann in v. 3 (2nd series) of Das Werk vom Haag, München, 1914, pp. 169-247. See also Bluntschli, § 374, and article by J. Basdevant, Les conflits de nationalité dans les arbitrages vénézuéliens, 5 R. D. I. privé, 1909, 41-63, in which several of the awards of the Caracas commissions of 1903 are criticized.

² Schreck (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2450 (*dictum*); Lavigne and Bister (U. S.) v. Spain, Feb. 12, 1871, 2454; Hammer and Brissot (U. S.) v. Venezuela, Dec. 5, 1885, *ibid.* 2456; Mathison (Gt. Brit.) v. Venezuela, Feb. 13, 1903, Ralston, 429, 436, 438; Stevenson, *ibid.* 438, 454. See also cases of Miliani, Brignone and Poggioli (Italy) v. Venezuela, cited above, and of Maninat and Massiani (France) v. Venezuela, *ibid.* The decision in Chopin (France) v. U. S., Jan. 15, 1880, Moore's Arb. 2506 appears contrary to the general rule. It may be explained, in part at least, on the ground that Oscar Chopin (the French father of children born in the U. S., to whom an award was made as French citizens) died after the ratification of the treaty of Jan. 15, 1880. See Boutwell's Report, 88. The decision is not well reasoned. See also Arata (Italy) v. Peru, Nov. 25, 1899, Descamps & Renault's Recueil, I, 709, 711, in which, contrary to the general rule, the *jus sanguinis* was given preference.

Apart from the implied recognition of the right of election involved in the application of the test of domicile, international tribunals have expressly recognized that a person born with dual nationality has the right, upon arrival at majority, of electing the nationality to which he desires to adhere.¹

§ 261. Measures to be Adopted to Adjust Conflicts of Nationality.

The legal and diplomatic difficulties engendered by the status known as dual allegiance will have become apparent in the course of this brief study.² Attempts have been made to adjust the conflict by treaty, but only slight success has been achieved. The United States has not entered into any such treaties, leaving aside for the moment the matter of naturalization treaties. At the time when the naturalization treaty of 1911 with Costa Rica was concluded, the following paragraph was proposed:

"Children of a father, being a citizen of the United States, born in Costa Rica, shall be considered as citizens of Costa Rica during their minority, and shall preserve the same nationality after reaching the age of twenty-one years, unless at that time or within a year thereafter, they make known, either directly or through the diplomatic or consular agents of the United States resident in Costa Rica, that they wish to elect the nationality of their father."

This principle was to apply *mutatis mutandis* to citizens of Costa Rica born in the United States. Such a provision is contained in existing treaties between Great Britain and Haiti, Mexico and Italy, and Spain and Salvador.

It is much to be desired that nations agree, by legislation or treaty, as they have in so many other matters in which there was a conflict

¹ Scott (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 2528; Julio and Gaston Rabel (No. 140 and No. 236), U. S. *v.* Spain, Spanish Treaty Claims Commission, Act of March 2, 1901 (American-born child of foreign parents taken abroad at early age and continuing to reside abroad). See Oral Argument of Asst. Atty. Jones, May 25, 1906, v. 7 of "Briefs." Canevaro (Italy) *v.* Peru, April 25, 1910, Hague Court, 6 A. J. I. L. 746, 8 R. D. I. privé (1912), 331. See also Doe *v.* Aeklam, 2 Bar. and Cress., 779 and Auchmuty *v.* Mulcaster, 5 Bar. and Cress. 771.

² In large measure, this question was the cause of the War of 1812 with Great Britain, inasmuch as Great Britain insisted upon the impressment of seamen from American vessels who were Americans under American law and British under British law.

of municipal law, to adopt a common rule as to nationality of origin, and to regard naturalization in a second country as having the effect of superseding the allegiance due to the country of birth.¹ A reasonable rule in the case of a person born with dual nationality would be, as suggested in connection with the Costa Rican treaty, that such a person should be considered a citizen of the country in which he was born if he should continue to reside there after reaching his majority.

§ 262. Absence of Nationality.

Even more anomalous than the position of the person possessing dual nationality is that of the person without any nationality, or *Heimatlos* as he is called in German. Such a condition occasionally arises at birth, but usually arises when a person loses or forfeits his original nationality, either by express or implied expatriation, and fails to acquire a new nationality. A person in this position cannot call upon the diplomatic protection of any state,² and it is said that the anomalous situation of a German who by residence abroad for ten years, under the law of June 1, 1870, lost his German nationality, led to the enactment of the new law of 1913.³ The United States has seemingly lent its aid to the perpetuation of this unfortunate system by certain provisions of the Act of March 2, 1907. For example, the presumption of expatriation on the part of a naturalized citizen by a residence of two years in his native state or five years in any other state,⁴ may well leave such a person without any nationality.

¹ See Cockburn, *op. cit.*, 186, 187. The countries which are subject to heavy emigration have always resisted this admission of the right of voluntary expatriation. This is probably the principal reason why the U. S. has been unable to conclude naturalization treaties with France, Italy, Switzerland, Turkey and Russia.

² See Anzilotti in 13 R. G. D. I. P. (1906), 12; *Corvaia (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 782. It is interesting to note that Congress by Joint Resolution of July 19, 1912 (37 Stat. L. II, 1346), unconditionally admitted to American citizenship one Eugene Prince, who was born in Russia of an American father who had never been in the U. S., and hence was not a citizen under § 1993, R. S., and who was also not recognized by Russia as a Russian subject.

³ See Meyer, Th., *Reichs- u. Staatsangehörigkeitsgesetz vom 22 Juli, 1913*, Berlin, 1913, *Einleitung*, p. 3 *et seq.* See also the introductions to the two leading commentaries on the new German law: Cahn, W., *Reichs- u. Staatsangehörigkeitsgesetz v. 22, 7, 1913*, erläutert, 4th ed., Berlin, 1914, and Keller, F., und Trautmann, P., *Kommentar zum . . . Gesetz v. 22, 7, 1913*, München, 1914.

⁴ Section 2 of the Act, 34 Stat. L. 1228.

Less justifiable, however, is the provision of § 3 according to which "any American woman who marries a foreigner shall take the nationality of her husband," apparently regardless of whether his national law so provides. Not only may this provision be unenforceable, but it may easily result in depriving a woman of American citizenship without conferring upon her any other. The rule stated by Field,¹ that "a person who has ceased to be a member of a nation, without having acquired another national character, is nevertheless deemed to be a member of the nation to which he last belonged, except so far as his rights and duties within its territory, or in relation to such nation, are concerned" can hardly be considered as a recognized rule of international law.

¹ Field, D. D., *Outlines of an international code*, 2nd ed., New York, 1876, 130. See also Morse, *Citizenship*, 160. Art. 20 of the Introductory Law of the German Civil Code provides that in the case of persons of no nationality, the law of the last country to which they belonged is to be applied, when their national law governs a case.

CHAPTER IV

EFFECT OF VARIOUS LEGAL RELATIONSHIPS

MARRIED WOMEN AND WIDOWS

§ 263. Effect of Marriage on Citizenship.

The effect of marriage upon the political status of women is of great importance, both in municipal and in international law. It will, therefore, be desirable to consider the status of foreign-born women married to American citizens, of American-born women married to aliens, and of widows of both these classes.

Under the municipal law of the United States, prior to the Act of Feb. 10, 1855,¹ marriage had no effect upon the citizenship of a woman, either to make a foreign-born woman American,² or an American-born woman foreign.³ This view supported the common-law doctrine as to expatriation, which prevailed in the English and American courts up to the middle of the nineteenth century, to the effect that no person can by any act of his own, without the consent of the government, change allegiance.

The civil law, on the other hand, had always held strongly to the unity of the institution of the family and the supremacy of the authority of the husband and father. Continental codes, therefore, and those of practically all civil law countries have from the be-

¹ 10 Stat. L. 604, incorporated in almost identical language in R. S., § 1994.

² *Mick v. Mick* (1833), 10 Wend. 379; *Priest v. Cummings* (1837), 16 Wend. 617; *Currin v. Finn* (1846), 3 Denio, 229. See also *Du Bouchet v. Award of Commissioners*, 2 Knapp P. C. 364. Similarly, the husband's naturalization had no effect upon the alien wife's citizenship, whether she resided in the U. S. or not. *White v. White*, 2 Met. (Ky.), 185, 191; *Kelly v. Harrison*, 2 Johns. Cas. 29. This was the rule of the common law. *Countess de Conway's case*, 2 Knapp, 364, 368. See also Lord Campbell in *Countess de Wall's case*, 12 Jurist, 348.

³ *Beck v. McGillis*, 9 Barb. 35; *Moore v. Tisdale*, 5 B. Mon. 352 cited in H. Doc. 326, 59th Cong., 2nd sess., 30, 145; *Shanks v. Dupont*, 3 Pet. 242, 248. Note in 22 L. R. A. 148.

ginning provided that the nationality of a woman follows that of her husband.¹

§ 264. Foreign-born Wife of American Citizen.

In 1844, a British law² was enacted providing that an alien woman who married a British subject became naturalized thereby. The first legislation of the United States in regard to the political status of married women was the Act of 1855, above mentioned, which was based upon the British statute. That Act, as incorporated in the Revised Statutes,³ reads:

“Any woman who is now, or may hereafter be, married to a citizen

¹ See Cockburn's approval of this rule of the civil law, *op. cit.*, 211. Alvorez states (*Droit int. américain*, Paris, 1910, p. 313) that in Latin-America, this is the rule only in Mexico, Costa Rica, Haiti, Peru and Guatemala. This statement is not believed to be quite accurate. There are slight variations from the general principle in a few countries. Thus, it is sometimes provided that the acquisition of the alien husband's nationality by a native woman is dependent upon her departure from national territory. Italian C. C., art. 11, § 3; Honduras, law of foreigners, arts. 5, 6. This seems also to be the law in Ecuador and Guatemala. The consent of the wife to the change of nationality by the husband, is sometimes required, *e. g.*, Portugal, C. C., art. 22, § 1; and British Act of 1914, § 10, in next note.

In some countries, a native woman takes her alien husband's nationality only if by his law it is conferred upon her. Mexico, law of May 28, 1886, art. 2, § 4; Belgium, law of June 8, 1909, art. 11, 102 St. Pap. 182; France, art. 19, C. C., as amended by law of June 26, 1889; Italy, C. C., art. 14; Portugal, C. C., art. 22, § 4; Costa Rica, law of Dec. 21, 1886, art. 4, § 5; Venezuela, art. 19, C. C.

In many of the Latin-American countries marriage to an alien does not denationalize a native woman. This is the law in Brazil, and from the fact that the laws of the other countries, except Mexico, Costa Rica, Guatemala, Honduras, Haiti, Peru, and Venezuela are silent upon the subject, Octavio Rodriguez in 6 *Rev. de l'Institut. de Dr. Comp.* 307 concludes that the law in these countries is the same as the Brazilian law. The same rule appears to govern in Spain.

² 7 and 8 Vict. 154, ch. 66, § 16. This was later repealed by § 10 (1) of the Act of 1870, which lays down the broad principle that the nationality of a married woman follows that of her husband. 33 and 34 Vict., ch. 14, § 10 (1). This provision is retained in the British Nationality and Status of Aliens Act, 1914, 4 and 5 Geo. V, ch. 17, § 10, with the new proviso “that where a man ceases during the continuance of his marriage to be a British subject, it shall be lawful for his wife to make a declaration that she desires to retain British nationality and thereupon she shall be deemed to remain a British subject.” See Piggott, F. T., *Nationality*, London, 1906, 1, 57-61.

³ Section 1994. The slight change in language does not affect the substance of the Act.

of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

The effect of this statute is that every alien woman who marries a citizen becomes perforce herself a citizen, without the formality of naturalization and regardless of her wish in that respect.¹

Certain matters connected with the statute require brief explanation. The first is as to the meaning of the word "married." In order to confer citizenship must the husband be a citizen at the time of the marriage, or does his subsequent naturalization have the same effect? ² It has been held that the word refers to the *status* of being married to a citizen, and not to the time when the marriage is celebrated,³ so that whenever citizenship of the husband and the state of marriage concur, regardless of the priority of either, the woman is "married to a citizen," and endowed with citizenship.⁴

The second question relates to the necessity of the wife's residence in the United States as a condition of citizenship. A practically uniform line of decisions has established the rule that the wife's residence in the United States is not necessary to confer citizenship upon her, either at any time during the marriage or after the death of the husband.⁵ Several secretaries of State, however, have been inclined not to follow the decisions of our municipal courts, and have held that naturalization in the United States had no international effect on the allegiance of the wife while she continues to reside in the country of origin.⁶ Nevertheless, the use of good offices has been authorized to assist the emigration of such foreign-born wives with a view to

¹ *Kane v. McCarthy*, 63 N. C. 299, 302; *Kelly v. Owen*, 7 Wall. (74 U. S.), 496, and cases cited in H. Doc. 326, *op. cit.*, 31 and 146-150.

² *Van Dyne*, *Citizenship*, 121.

³ *Kane v. McCarthy*, 63 N. C. 299; *Kelly v. Owen*, 7 Wall. 496.

⁴ 14 Op. Atty. Gen. 406 (Williams); *Renner v. Müller*, 57 How. Pr. 229.

⁵ *Kane v. McCarthy*, 63 N. C. 299; *Ware v. Wisner*, 50 Fed. 310; U. S. *ex rel. Nicola and Gendering v. Williams*, 184 Fed. 322, and other cases cited by Van Dyne, *op. cit.*, 124, and by Moore's Dig. III, § 410. See also 14 Op. Atty. Gen. 402, 27 Op. Atty. Gen. 507 (Wickersham), reviews the cases.

⁶ Moore's Dig. III, § 416; Van Dyne, *Naturalization*, 234-238. The view of the Department is correct in international law, provided that the country of origin asserts a conflicting claim to the allegiance of the married woman, but not if it admits that her citizenship follows that of her husband.

joining their American-resident husbands. It has, moreover, been the practice of the Department of State to refuse a passport to a foreign-born widow of an American citizen who has never been in the United States and who has no intention of coming here to reside.¹ The Act of March 2, 1907² has modified the effect of these rulings by making the retention of American citizenship by a foreign-born non-resident widow of an American citizen dependent upon her registration of citizenship before a United States consul within one year after the termination of the marriage.

It must, of course, be remembered that the rule conferring American citizenship upon the non-resident wife of an American citizen has no obligatory effect in foreign countries, so that the United States could not impose its citizenship and protection upon such non-resident woman against a conflicting claim of citizenship on the part of her native country.³

A third matter of importance relates to the meaning of the clause "who might herself be lawfully naturalized." Prior to the Immigration Act of 1907 it had been held on several occasions that these words refer to the class or race that might be lawfully naturalized, and compliance with the other conditions of the naturalization laws, such as character, residence, etc., was not required. That is to say, the terms of the statute apply to "free white women" (or those of African nativity, under the Act of July 14, 1870, or an Indian under the Act of August 9, 1888) and exclude Chinese, Japanese and other women of races which cannot become naturalized under the laws of the United States.⁴

¹ *Infra*, p. 599.

² Act of March 2, 1907, § 4, 34 Stat. L. 1229, *infra*, p. 600.

³ 13 Op. Atty. Gen. 128 (Hoar), Sec'y of State Foster to Mr. Thompson, Feb. 9, 1893, For. Rel., 1893, 598; Moore's Dig. III, § 416. Sec'y Olney expressed the view that the naturalization of a Turk does not naturalize his Turkish wife, resident in Turkey and never in the U. S. S. Doc. 83, 54th Cong., 1st sess., For. Rel., 1895, II, 1471-1473; Van Dyne, Naturalization, 235-238. As already observed, this view is contrary to the decisions of the courts. Provided the woman is denationalized in her native state by marriage to an alien, as is the case in Turkey, no conflict of laws arises, and there seems no reason not to endow her with her husband's nationality. See U. S. *ex. rel. Nicola v. Williams*, 173 Fed. 626, affirmed, 184 Fed. 322; Mr. Fish, Sec'y of State, to Mr. Jewell, June 9, 1874, Moore's Dig. III, 457, 461.

⁴ *Burton v. Burton*, 26 Howard Pr. 474; *Kelly v. Owen*, 7 Wall. 496; *Leonard v*

Under the Immigration Act of Feb. 20, 1907 certain classes of aliens, among others, those having certain contagious diseases, are excluded from the United States. The question has been presented to the courts whether the provisions of the Immigration Act apply to the foreign-born wives of citizens of the United States, or whether, as citizens, they must be admitted under any circumstances. The decisions have been conflicting. In two cases it has been held that it was no part of the intended policy of § 1994 to annul or override the immigration laws so as to authorize the admission into the country of the wife of a naturalized alien not otherwise entitled to enter.¹ The opinion was expressed, with reference to the clause "who might herself be lawfully naturalized," that if the woman belonged to a class of aliens forbidden by law to enter or to remain, it cannot be said that she is capable of being lawfully naturalized.

In other cases, however, marriage of an alien woman to an American citizen has been held to operate as a bar to the application of the provisions for exclusion and deportation under the Immigration Act, § 1994 being regarded as unaffected by that Act.²

The Department of State usually extends its diplomatic protection to the non-resident foreign-born wife of a native American citizen. In the case of an American citizen going abroad, in company with his wife, it is the practice of the Department in issuing a passport, to include after the name of the applicant the phrase "accompanied by his wife." Until recently, it was the custom to omit this phrase when the applicant's wife was a Japanese or Chinese woman. It is the practice of the immigration authorities to admit such women upon the presentation of a certificate from a United States consular officer stating that they are married to American citizens.³ As the reference

Grant, 5 Fed. 11 and other decisions cited by Van Dyne, *op. cit.*, 120-121; For. Rel., 1903, 44-45. Claim of Mrs. Coe, a Samoan widow of American citizen, *v. U. S.*, Report of Jos. R. Baker to Sec'y of State, H. Doc. 1257, 62nd Cong., 3rd sess., 17.

¹ *In re Rustigian* (1908), 165 Fed. 980, 982 (appears, however, to be *dictum*); *Ex parte Kaprielian* (1910), 188 Fed. 694.

² *U. S. ex rel. Nicola v. Williams*, 173 Fed. 626, *aff.* 184 Fed. 322; *Hopkins v. Fachant*, 130 Fed. 839, 65 C. C. A. 1 (see note at p. 5); 27 Op. Atty. Gen. 507-520 (Wickersham), in which the cases are discussed and the Rustigian opinion criticized.

³ See circular instruction of Jan. 18, 1908.

to the wife in the passport is not a certificate or statement of her citizenship, the Department has decided no longer to omit the phrase above mentioned in the case of Japanese or Chinese wives of American citizens.

In the case of the non-resident wife of a person who becomes naturalized, the Department has held on numerous occasions that naturalization had no international effect on the allegiance of the wife while she continues to reside in the country of origin.¹ Where the native country, however, recognizes the American naturalization of the husband as a valid change of allegiance, and provides, as is generally the case, that a woman follows the nationality of her husband, there seems no reason for denying American citizenship to the non-resident foreign-born wife of a naturalized citizen, thus following the decisions of our municipal courts. In recent years, indeed, it appears that the Department has freely issued passports to the foreign-born non-resident wives of American citizens, without inquiry into the recognition of their American citizenship by the country of residence. But even where formal protection of the absent family of a naturalized citizen has been otherwise denied, the Department has not hesitated to instruct its diplomatic representatives to use their good offices to procure permission for and to assist the emigration of such persons to join the husband and father in the United States. This informal assistance has been extended frequently in Turkey.²

§ 265. Foreign-born Widow of American Citizen.

A married woman, as a general rule, takes her husband's nationality and domicil. Upon his death, such nationality and domicil adhere to her until she abjures the one and abandons the other. The foreign-born widow of an American citizen may, after the husband's death, revert to her original citizenship or retain her American citizenship.³ In determining the right of such a widow to the continued protection

¹ Moore's Dig. III, § 416; Van Dyne, Naturalization, 235-238. As already observed, this seems directly contrary to the decisions of American courts and opinions of Attorneys General, above cited. In the case of non-resident children, the ruling is in accordance with § 2172, R. S., *supra*, p. 459.

² Moore's Dig. III, § 418.

³ *Ibid.*, § 411; *infra*, § 600.

of the United States, the Department, even before the Act of March 2, 1907, laid much emphasis upon the matter of her election of citizenship. In establishing her election, the place of her domicile was deemed of prime importance. If, after the death of her husband, she continued a previous residence in, or if abroad, came to the United States, her American citizenship was construed as continuing even after widowhood, and she was fully protected as an American citizen. The United States has even resisted the claim of her native country to her citizenship, so long as the widow remained in the United States.¹

On the other hand, if such a widow resided abroad and had no intention of coming to the United States, protection was usually refused.² Where, for example, a foreign-born alien woman, married abroad to an American citizen, and both during and after the termination of the marriage (by death or divorce) continued to reside in her native country, the Department has considered itself as not warranted in extending diplomatic protection to her.³ When she thereby resumed her original nationality in the country of her origin, the United States, under well-established principles, could not protect her in the country of her birth and continued domicile.⁴ In line with these views, the Department has held that an alien woman who married an American citizen and secured a divorce from him in the United States and then re-

¹ Mr. Adee, Ass't Sec'y of State, to Mr. Knagenhjelm, Aug. 21, 1895, Moore's Dig. III, 458 (a divorcee of a naturalized citizen).

² Moore's Dig. III, § 411. The occasional exceptions occurred in cases where the foreign residence was in an extraterritorial country, or where her original nationality did not revert according to the law of her native country, so that her continued foreign residence was not inconsistent with American citizenship. See Act'g Sec'y Uhl in For. Rel., 1894, 139, and Sec'y Hay to Mr. Choate, Jan. 14, 1901, Moore's Dig. III, 459.

³ Mr. Evarts, Sec'y of State, to Mr. Marced de la Rodia, June 21, 1879, Moore's Dig. III, 458.

⁴ Mr. Gresham, Sec'y of State, to Mr. Baker, Jan. 24, 1894, For. Rel., 1894, 460.

An exception appears to have been made in the case of Mrs. Groce, a native Nicaraguan, and widow of an American citizen. Having been always domiciled in Nicaragua, she recovered Nicaraguan nationality on widowhood. The U. S. nevertheless demanded from Nicaragua \$10,000 indemnity for the murder of Mr. Groce, on behalf of the widow and children, also native Nicaraguans. The U. S. in the meantime advanced the widow \$60 per month for the support of the family, but reduced this to \$50 when the widow remarried. The original claim for indemnity, however, was not reduced.

turns to her native country to reside must be deemed to have abandoned the citizenship acquired by marriage and to have intended to adopt her native allegiance.¹

This practice of the Department has received statutory sanction, with slight modifications, by the Act of March 2, 1907. This Act provides that

"any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation."²

It has been held by the Department that this section cannot be applied retroactively. Moreover, with respect to non-resident widows, the provision for consular registration for the purpose of retaining American citizenship would appear to lay down a procedure which is optional with the individual and not mandatory, and that other methods of retaining citizenship are not excluded by the words of the Act.³ Thus, by returning at once to the United States to reside the woman would, it seems, clearly manifest her election, without any consular registration. Again, it would seem that registration in legations, which is allowed for many purposes connected with citizenship, might be acceptable as an election of citizenship. Moreover, it has

¹ Case of Mrs. Weiss, Mr. Bayard, Sec'y of State, to Mr. Winchester, March 19, 1888, For. Rel., 1888, II, 1531; Case of Mrs. Abeldt-Fricker, Mr. Root, Sec'y of State, to the Swiss Minister, June 2, 1906, For. Rel., 1906, 1365; Case of Mrs. I. Mathias, Act'g Sec'y Bacon to Mr. Hill, Jan. 28, 1909, For. Rel., 1909, 273.

² Act of March 2, 1907, § 4, 34 Stat. L. 1229. The words "as such" are not well used, although the intention of the framers of the Act is probably clear. Under British law the nationality of the marriage state continues after widowhood. This is specifically provided in the British Nationality and Status of Aliens Act, 1914, § 11. The Act of 1870 mentioned only British women, the widows of aliens. Pigott, *op. cit.*, 61.

³ In the Circular Instruction of April 19, 1907 (For. Rel., 1907, 10), in which the Executive order of April 6, 1907 is quoted, the procedure for proof of citizenship and registration are set forth. The Circular states that the woman "must, within one year . . . register with an American consular officer." This is a departure from the terms of the statute; the practice of the Department has not considered the requirement mandatory.

been the practice of the Department to allow the widows of American citizens, in some cases, to register after the expiration of the one year mentioned in the statute. Where an alien-born widow or divorced wife of an American citizen has not come to the United States or registered her intention to retain American citizenship as provided by the Act, or where, after the termination of the marriage, she left the United States, it would seem that she should be subject to the same presumption of expatriation which applies to any other naturalized citizen under § 2 of the Act of March 2, 1907.¹

§ 266. American-born Wife of an Alien.

The question as to whether an American woman who marries a foreigner becomes herself an alien has been before the courts on several occasions, with results which can hardly be considered as satisfactory. It has already been observed² that at common law a native woman did not lose her citizenship by marriage to an alien. In view of the fact that foreign women did not, prior to 1855, become American citizens by marriage to Americans, and in view of the then existing theory as to the impossibility of voluntary expatriation without governmental consent, it is not surprising that the decisions of the first half of the nineteenth century held that an American-born woman did not lose her American citizenship by marriage to an alien.³ Since 1890, several cases have again called the matter into question. Until the Act of 1907, the courts inclined to the view that if the native woman married a non-resident alien, she is to be deemed an alien provided there be "that withdrawal from her native country or equivalent act expressive of her election to renounce her former citizenship as a consequence of her marriage."⁴ Where, however, the alien was a resident and the matrimonial domicil was always in the United States, which the woman never left, a federal court in the case of *Comitis v. Parkerson*⁵ expressed the opinion that the American wife did not, under

¹ *Infra*, § 330.

² *Supra*, p. 593.

³ *Shanks v. Dupont* (1830), 3 Peters, 242; *Beck v. McGillis* (1850), 9 Barb. 35. See H. Doc. 326, 59th Cong., 2nd sess., 150-151. See also Van Dyne, *op. cit.*, § 55.

⁴ *Ruckgaber v. Moore* (1900), 104 Fed. 947, *aff. in* 114 Fed. 1020. See also *Jennes or Jenns v. Landes* (1897), 84 Fed. 73; 85 Fed. 801.

⁵ *Comitis v. Parkerson* (1893), 56 Fed. 556, and note in 22 L. R. A. 148; H. Doc.

these circumstances, lose her American citizenship. In this case, the court disapproved, while distinguishing, an earlier federal decision of Mr. Justice Brown,¹ in which he had held that an alien woman who had once become an American citizen by marriage, which marriage is subsequently dissolved, may resume her alienage by marriage to an alien—in the case at bar, a native of her original country.

The many possibilities of dual allegiance created by a ruling such as that in the case of *Comitis v. Parkerson*, lend some weight to the view that the decision in the case of *Pequignot v. Detroit* is the sounder of the two, and time has apparently confirmed that view. By the Act of March 2, 1907, Congress has provided "that any American woman who marries a foreigner shall take the nationality of her husband."²

The Supreme Court of California in a recent decision³ held that by such a marriage an American woman ceased to be a citizen of the United States, whether she intended that result or not, and notwithstanding the fact that she was married in this country to an alien permanently here resident and that both she and he continued here to reside. The decision is, however, open to several questions: is it opposed to § 1 of the Fourteenth Amendment in depriving a native citizen of citizenship; did the Act of 1907 intend to expatriate a native woman who had never left the United States; has Congress the power to

326, *op. cit.*, 150. See also *Wallenburg v. Mo. Pac. Ry. Co.* (1908), 159 Fed. 217. It seems that the Act of 1907 was not called to the court's attention in this case.

¹ *Pequignot v. Detroit* (1883), 16 Fed. 211. See also H. Doc. 326, *op. cit.*, 152. Justice Brown, in a well-reasoned opinion, considered *Shanks v. Dupont*, 3 Pet. 242, as no longer binding, the reasons on which that decision was based—the impossibility of voluntary expatriation, and the continued alienage of an alien woman who marries a citizen—having ceased to exist. Justice Brown's decision is squarely contrary to that of Sol. Gen. Phillips in *Mrs. D'Ambrogia's case*, 15 Op. Atty. Gen. 599 (cited with approval in *Kreitz v. Behrensmeyer*, 1888, 125 Ill. 141, 198) in which, relying upon *Shanks v. Dupont*, he held that marriage of an alien woman to a citizen conferred upon her a permanent status of citizenship, not defeasible by her second marriage to a resident alien.

² Act of March 2, 1907, § 3. Such a provision has been in force in England since 1870. 33 and 34 Vict., ch. 14, § 10 (1). It is reincorporated in the British Act of 1914, § 10, not without vigorous opposition from various members. See *Parliamentary Debates*, July 29, 1914, col. 1461, 1487 *et seq.*

³ *Mackenzie v. Hare* (1913), 165 Cal. 776, 783.

impute a foreign nationality to a native woman marrying an alien, and especially, assuming that the husband's national state does not make her a citizen by the marriage, can Congress thus deprive a native citizen of all nationality; does the Act of 1907 relate to marriages concluded prior to its enactment? Some or all of these questions will undoubtedly be passed upon by the United States Supreme Court in the appeal which has been noted from the decision of the California court.

Between 1862 and 1869 different Attorneys General of the United States expressed their opinions upon the effect of the marriage of an American woman to a foreigner. In the case of *Mrs. Preto*, Mr. Bates held that the marriage in this country of an American woman to a Spanish subject and their subsequent residence in Spain until his death, did not divest her of American citizenship.¹ On the other hand, Attorney General Stanbery held that the marriage of an American girl to a French subject in France, where she had always been domiciled, conferred upon her French nationality, and she was not to be treated as a citizen of the United States.² Attorney General Hoar concurred in this opinion so far as it had reference to the internal revenue act (subjecting citizens abroad to an income tax), but declined to express an opinion as to whether a citizen by birth, marrying a Frenchman, "is not after such a marriage a citizen of the United States in a qualified sense."³

The rulings of the State Department prior to the Act of 1907 have not been entirely consistent. While recognizing the fact that in strict law, an American woman did not lose her American citizenship by marrying a foreigner, nor suffer the disabilities of alienage so far as property rights were concerned, nevertheless when she was residing abroad and had by her marriage, in contemplation of the law of her husband's country, acquired his citizenship, an American passport and protection were refused her. Her citizenship during coverture was held not to be completely divested but to be in abeyance only, and susceptible of revival after widowhood, "by her return to the

¹ 10 Op. Atty. Gen. 321.

² 12 *Ibid.* 7.

³ 13 *Ibid.* 128.

jurisdiction and allegiance of the United States.”¹ As a practical matter, American women married to aliens very rarely received the diplomatic protection of the United States abroad.²

§ 267. American-born Widow of an Alien.

Upon the termination of the marital relation, however, by death or divorce, her right to revert to American citizenship was freely admitted. If a non-resident American-born widow or divorced wife of an alien gave evidence of her intention to resume her residence and citizenship in the United States, or if, having been resident in the United States, she continued here to reside, a passport was issued and protection extended to her as an American citizen.³

Section 3 of the Act of March 2, 1907, first gave statutory expression in the United States to the principle that “any American woman who marries a foreigner shall take the nationality of her husband.” This rule, which follows the British law,⁴ also adheres to its principal defect, in that it appears to ignore the law of the country to which an alien who marries an American woman belongs.⁵ If his national law should not endow her with his citizenship, a peculiar case of no nationality would arise.

Section 3 of the Act of March 2, 1907 provides further:

“At the termination of the marital relation [the American woman who marries a foreigner] may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.”⁶

¹ Mr. Blaine, Sec’y of State, to Mr. Phelps, Feb. 1, 1890, For. Rel., 1890, 301. (Case of Mrs. Heisinger.)

² See the extracts from For. Rel., and other papers quoted in Moore’s Dig. III, 450–454, and Van Dyne, Citizenship, 133–138.

³ Moore’s Dig. III, § 409. See also Act’g Sec’y Bacon to Mr. Clay, Jan. 26, 1906, For. Rel., 1906, 1370.

⁴ 33 and 34 Vict., ch. 14, § 10 (1); reincorporated in 4 and 5 Geo. V, ch. 17, § 10, with the proviso noted, *supra*, p. 594.

⁵ The nationality laws of some foreign countries take account of this contingency by a proviso, *e. g.*, art. 11 of the Belgian law of June 8, 1909; art. 2, § 4 of the Mexican law of May 28, 1886, and *supra*, p. 594, note 1.

⁶ See also Circular Instruction of April 19, 1907, Registration of women who desire to resume or retain American citizenship, For. Rel., 1907, 10.

In contrast to the liberal interpretation given to § 4 of the Act, it has been held that the American-born widow of an alien, according to § 3, must register within a year at an American consulate, and that the period for registration cannot be extended beyond the year. She may, of course, at any time resume her American citizenship by coming to the United States permanently to reside.¹ If residing abroad after the lapse of the year allowed for registration, she would not be protected as an American citizen. A marriage is considered as terminated by death or divorce only, a mere separation not having this effect.²

§ 268. Decisions of International Tribunals of Arbitration.

International commissions, with practical uniformity have held that the nationality of a married woman follows that of her husband in all cases, irrespective of domicil.³

A distinction has, however, been generally made in the case of widows. If the domicil of the wife and widow continue to be that of her hus-

¹ By the British Act of 1870 (33 and 34 Vict., ch. 14, § 10, 2), the widow may resume British nationality by going through a process of repatriation, which is practically identical with naturalization. Piggott, *op. cit.*, 61-62. This provision appears to be omitted from the British Nationality and Status of Aliens Act, 1914. In the debates, the Secretary of State, Harcourt, stated that by regulation the government would enable a widow to resume her nationality or rather claim new naturalization, counting her residence in Great Britain before marriage in the five-year residence period. Debates, July 29, 1914, col. 1461 *et seq.*

² *Dictum* of Act'g Sec'y Bacon, For. Rel., 1909, 273.

³ Brand (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 2487 (notwithstanding attempt, by certain registration, to assert her original nationality); Tooraen, *ibid.* 2486, Hale's Rep. 18; Bowie, *ibid.* 2485, Hale's Rep. 17; Grayson (Gt. Brit.) v. U. S., May 8, 1871, Hale's Rep. 19; Lebreton (France) v. U. S., Jan. 15, 1880, Moore's Arb. 2488, 2492. (All cases of alien women married to American citizens whose claims against the U. S. in the character of aliens were dismissed.) See also Biencourt (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2483 (*dictum* by Wadsworth, Amer. com., in which it was said that by marriage in U. S. to an alien, an American woman did not take her husband's nationality); Bertherand (U. S.) v. Mexico, *ibid.* 2485; Maxan (U. S.) v. Mexico, *ibid.* 2485; Young (U. S.) v. Mexico, *ibid.* 1353. (In these cases, Biencourt's claim being allowed on another ground, American women married to aliens were held not to be American citizens, and their claims as such were disallowed. See also in support of the general rule, Lizardi (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2483; Calderwood (Gt. Brit.) v. U. S., May 8, 1871, *ibid.* 2485-2486; Giacomini (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 767.

band's national country, citizenship during marriage has been held to continue unchanged after widowhood.¹ If, however, as a widow she continues her domicile in or returns permanently to her native country, under whose law her original nationality reverts, international commissions have almost uniformly held that not the nationality of her deceased husband (which can have no obligatory extraterritorial effect), but the law of her native country and actual and continued domicile governs her citizenship.²

CHILDREN

§ 269. Citizenship at Birth.

It is not within the purview of this work to discuss the municipal law of citizenship. Nevertheless, inasmuch as the international aspects of citizenship are often necessarily involved in the matter of diplomatic protection, it seems desirable briefly to notice some of the principal features connected with the acquisition of American citizenship and title to protection.

Citizenship is acquired by birth or naturalization. Citizenship by birth may be acquired either by birth in the United States or by birth abroad to American citizens.³ The effects of a conflict with the

¹ Brand (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 2487, Hale's Rep. 18; Bowie, *ibid.*, Moore's Arb. 2486, Hale, 17.

² The majority of the British-American commission of 1871 held that the national character of the widow acquired by marriage remained unchanged, regardless of domicile, apparently. Calderwood (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 2485, Hale's Rep. 18. Mr. Frazer, American commissioner, dissented in this case, in which a widow of American origin had always remained domiciled in the U. S. Mr. Frazer believed that in such case her national character reverted. It must be remembered that in 1871, the U. S. had no law providing for readmission to American citizenship of one who had become an alien through her marriage. Ralston, Umpire, disapproved of the Calderwood decision in Brignone (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 717. Venezuela, in which many of the cases have arisen, has for years had a law by which the Venezuelan citizenship of the native domiciled widow of an alien reverts. In support of the principle in the text see de Hammer and de Brissot (U. S.) *v.* Venezuela, Dec. 5, 1885, Moore's Arb. 2456, 2460-2461; Willett (U. S.) *v.* Venezuela, *ibid.* 2254 (*dictum*, claim disallowed as widow; but allowed as administratrix); Massiani (France) *v.* Venezuela, Feb. 19, 1902, S. Doc. 533, 59th Cong., 1st sess., 211; Stevenson (Gt. Brit.) *v.* U. S., Feb. 13, 1903, Ralston, 444, 445; Brignone (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 716, 717; Miliani (Italy) *v.* Venezuela, *ibid.* 760; Poggioli (Italy) *v.* Venezuela, *ibid.* 866.

³ See Van Dyne, Citizenship, Rochester, 1904; Wharton, § 183 *et seq.*, Moore's

law of other countries by which dual nationality ensues have already been, to some extent, considered.¹

According to the civil rights Act of April 9, 1866,² "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States," and according to the Fourteenth Amendment to the Constitution, adopted in 1868, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." These two definitions appear to be declaratory of the common law. Yet on several occasions the courts and the Department of State appear to have misinterpreted the clauses "not subject to any foreign power" and "subject to the jurisdiction" by construing them so as to exclude from citizenship the children born in this country of alien parents, according to whose national law their children became subjects *jure sanguinis*.³ The uniform construction of the law at the present time confers citizenship upon all persons (not tribal Indians) born in the United States, even of aliens, permanently or temporarily here resident,⁴ and interprets the clause "subject to the jurisdiction," as excluding merely children born in places enjoying extritoriality, such as foreign legations or public vessels.⁵

As has been observed, when a child born in this country of alien parents is taken abroad at an early age to the country of his parents, by whose national law he is deemed a subject *jure sanguinis*, and he continues there to reside, a right of election of nationality arises at Dig. III, §§ 373-374; Report of Citizenship Board, H. Doc. 326, 59th Cong., 2nd sess. 73-79.

¹ *Supra*, § 253 *et seq.*

² R. S., § 1992.

³ *Dicta* in Slaughter-House Cases, 16 Wall. 73, and in *Elk v. Wilkins*, 112 U. S. 99, briefly discussed by Van Dyne, *op. cit.*, 12-15. See also Hausding's case, For. Rel., 1885, 394, and Greisser's case, For. Rel., 1885, 814. An account of the development of the American law of citizenship by birth in the U. S. is given by Van Dyne, 3 *et seq.*

⁴ *Lynch v. Clark*, 1 Sandf. Ch. 583; *McCreery v. Somerville*, 9 Wheat. 354; *In re Look Tin Sing*, 10 Sawyer, 353, 21 Fed. 905, and the great case of *U. S. v. Wong Kim Ark* (1898), 169 U. S. 649. See Report of Citizenship Board, 73-74; Van Dyne, 17-24; and Moore's Dig. III, 280.

⁵ *Geofroy v. Riggs*, 133 U. S. 258, 264; Act'g Sec'y Wharton in For. Rel., 1891, 21.

majority.¹ By failing to manifest his election of American citizenship, and by continuing to reside abroad after majority, he loses whatever right to American protection he may have had during minority. If no question of dual nationality arises, it would seem that the mere fact of long-continued residence abroad would not deprive him of his American citizenship or protection. It is quite probable, however, that upon return to this country even a considerable time after majority, he would be deemed an American citizen in this country.

§ 270. Foreign-born Children of American Citizens.

Citizenship is also conferred, at birth, upon children

“born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof . . . but the rights of citizenship shall not descend to children whose fathers never resided in the United States.”²

There are several conditions necessary to complete title to American citizenship under this statute. First, the father must have been a citizen at the birth of the child. If, before the birth of the child, his citizenship was renounced or abandoned, or if he in any way expatriated himself, the child is born an alien.³ If, however, the expatriation of the father occurs after the birth of the child, it has been held that the child is not thereby irrevocably deprived of American citizenship, but that he may, upon attaining majority, revive his inchoate right to American citizenship by returning to the United States, thus manifesting his election of American citizenship.⁴ Notwithstanding the repeated assertion of the Department that a minor is incompetent to elect nationality, it is certain that by returning to the United States during minority, the child would be regarded by our courts as an

¹ *Supra*, § 259. See also H. Doc. 326, 59th Cong., 2nd sess., 74-76.

² R. S., § 1993, H. Doc. 326, 59th Cong., 2nd sess., 77-80 and American decisions there cited. Van Dyne, Citizenship, 32-49; Moore's Dig. III, §§ 374, 426. The posthumous child is also held to be an American citizen. Rosen's case, 1911.

³ 14 Op. Atty. Gen. 295, and *infra*, § 319. See also Warren-Lippit's case, For. Rel. 1910, 71, 76.

⁴ *Supra*, § 259. It would seem that a widowed mother cannot, without the approval of the court of the child's domicile, change the domicile and nationality of her minor child. Sec'y Bayard to Mr. Liebermann, July 9, 1886, Moore's Dig. 541, citing von Bar and Foelix, and *Lamar v. Micou*, 112 U. S. 542.

American citizen, and if he subsequently went abroad, would be entitled to American protection.¹ The status, during minority, of the foreign-born child of a native American citizen who, after the birth of the child, expatriates himself, does not appear to have come before the American courts.

To confer citizenship upon a child born abroad, the father must have resided in the United States. This limitation upon the right of transmitting citizenship indefinitely was intended to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties.² It seems not to have been judicially determined whether the residence of the father in the United States must necessarily have preceded the birth of the child, but by the fact that the statute provides that citizenship shall not "descend," it is believed that the residence prescribed must have preceded the birth of the child, and such has been the construction of the Department.³

As will be observed more fully hereafter,⁴ an exception to the application of this provision of § 1993 has until recently been made in the case of children born in distinctively American communities in Turkey, in which citizenship was deemed heritable from generation to generation, regardless of the father's non-residence in the United States. In 1914, however, the Department reversed its previous ruling as laid down since 1887, and held § 1993 to be universally applicable, without exception.⁵

§ 271. Election of Citizenship under § 6 of Act of 1907.

According to § 6 of the Act of March 2, 1907, foreign-born children who are declared citizens by § 1993 of the Revised Statutes are "required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and . . . to take the oath of allegiance to the

¹ *Supra*, § 258.

² Van Dyne, *op. cit.*, 34.

³ See, however, *State v. Adams*, 45 Iowa, 99, in which this point does not appear to have been considered.

⁴ *Infra*, § 333.

⁵ Special Consular Instruction, No. 340, July 27, 1914, Citizenship of children born of American fathers who have never resided in the United States.

United States upon attaining their majority.”¹ As has been explained,² the Department of State has construed the word “upon” to signify “within a reasonable time after,” so that the declaration of intention “to become residents and remain citizens of the United States” may be made at any time after the minors concerned have reached the age of eighteen and before they take the oath of allegiance;³ and the oath of allegiance may be taken within a reasonable time after reaching majority. A minor over eighteen, therefore, would practically be entitled to a passport whenever he made his declaration; and even for a reasonable time after majority, if he is then prepared also to take the oath of allegiance.

Notwithstanding this statutory provision, which relates merely to the right of protection, municipal courts may well hold such persons to be citizens of the United States. When these persons, after reaching the age of majority, continue to reside abroad and have no definite intention to reside in the United States, registration and passports are uniformly denied them.⁴ Should the minor have returned to the United States to reside, and subsequently, after majority, goes abroad, even to the country of his birth, he will be considered as having perfected his status as an American citizen, and as having full title to American protection.⁵ In one case where a circus performer, born abroad of an American citizen, applied for a passport at the age of twenty-nine, but stated that he intended to come to the United States, the Department authorized the issuance of the passport on the ground that he had the *animus revertendi*, had not apparently established himself in any other country, and that his pursuits required a nomadic life.⁶

¹ Circular, Children of citizens born abroad, April 19, 1907, For. Rel., 1907, I, 9.

² *Supra*, p. 587.

³ Circular, March 14, 1911. This interpretation practically nullifies the statutory requirement of recording intention prior to reaching full age, but does not entirely eliminate the inconsistency with numerous rulings of the Department to the effect that a minor is incompetent to make a final election of nationality.

⁴ In *Albany v. Derby*, 30 Vermont, 718, the court declared that if the foreign-born child did not return to America until after he was of age, he was an alien.

⁵ *Crowninshield's case*, Mr. Gresham, Sec'y of State, to Capt. Crowninshield, Feb. 23, 1895, For. Rel., 1895, I, 426. See also Moore's Dig. III, 284-285.

⁶ *Case of Clemens Beling*, For. Rel., 1907, 975.

§ 272. Citizenship by Naturalization of Parent.

Citizenship may be conferred upon a minor child by the naturalization of the father,¹ or of the widowed mother.² While a mere declaration of intention is not sufficient thus to confer citizenship, it will serve this purpose if the father dies before he is actually naturalized.³

It seems clear that if the minor is resident in the United States, he is naturalized by the father's act.⁴ There was, at one time, some doubt in case the minor was non-resident. In this case, the decisions of the courts left it uncertain whether the child had to reside in the United States at the time of naturalization or whether there was a sufficient compliance with the statute by his coming to the United States during minority.⁵ Again, prior to the Act of March 2, 1907, it seemed doubtful whether such a non-resident minor could be considered a citizen before acquiring a residence in the United States. Section 5 of the Act of March 2, 1907⁶ now provides expressly that

"a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided*, That such naturalization or resumption takes place during the minority of such child: *And provided further*, That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

This statutory provision confirmed the view of the Department and the courts, that the naturalization of an alien had no effect upon his non-resident minor child who did not enter the United States during minority.

Until the minor child of a naturalized citizen begins to reside per-

¹ Section 2172, R. S., as amended by § 5 of the Act of March 2, 1907; 10 Op. Atty. Gen. 329. The American decisions on this matter are fully discussed in H. Doc. 326, 59th Cong., 2nd sess., 33, 138-142; Van Dyne, *op. cit.*, 108-118; Moore's Dig., § 413.

² *Brown v. Shilling*, 9 Md. 74, H. Doc. 326, 59th Cong., 2nd sess., 143-144. The marriage of the widowed alien mother to an American citizen, confers citizenship upon her and thus upon the minor children of her marriage. *Ibid.*, p. 144, Moore's Dig., § 414.

³ Act of June 29, 1906, § 4, ch. 6, 34 Stat. L. 596, embodies the provisions of R. S., § 2168, repealed. *In re Shearer*, 148 Fed. 839. The declaration of intention of the stepfather has same effect. *In re Robertson*, 179 Fed. 131. The widow and children are considered citizens, if they take the oaths prescribed by law.

⁴ Cases cited in H. Doc. 326, 59th Cong., 2nd sess., 34.

⁵ *Ibid.* 34, 138-142.

⁶ 34 Stat. L. 1229.

manently in the United States, he is an alien and subject to exclusion from the United States if within the class of aliens who are debarred from entry under the Immigration Act, nor can he begin to reside permanently until he has been allowed to enter.¹ It was in order to remove the doubt as to the meaning of the term "if dwelling in the United States" that the Act of 1907 substituted the term "begins to reside permanently in the United States." The Department has ruled, however, that even though the minor may have resided in the United States for a time after the naturalization of the parent and before his majority, nevertheless if he goes abroad before attaining his majority and remains there, he does not become a citizen.²

It seems beyond doubt that citizenship is not conferred upon an alien child by his adoption by an American citizen.³

§ 273. Illegitimate Children.

An illegitimate child born in this country is a citizen.⁴ If born abroad to an American mother and an alien father it seems that the child would not be an American citizen, for under § 1993 of the Revised Statutes citizenship is not inherited through women.⁵ Nor if the father is an American does § 1993 confer citizenship upon his illegitimate child, for an illegitimate child is *filius nullius* and presumed to have no father.⁶ Thus, it seems clear that illegitimate half-castes born in semi-barbarous countries of American fathers and native women are not American citizens.⁷

A more difficult question arises as to the effect of legitimation upon

¹ *Nishimura Ekiu v. U. S.*, 142 U. S. 651; *Zartarian v. Billings*, 204 U. S. 170; U. S. *ex rel. Abdoo v. Williams*, 132 Fed. 894; U. S. *ex rel. De Rienzo v. Rodgers*, 185 Fed. 334.

² Mr. Blaine, Sec'y of State, to Mr. Phelps, Feb. 1, 1890, For. Rel., 1890, 301; Sec'y Blaine to Mr. Smith, Feb. 28, 1891, Moore's Dig. III, 469; Sec'y Hay to Mr. Hardy, quoted by Van Dyne, *op. cit.*, 116.

³ Moore's Dig. III, § 415.

⁴ As a general rule, illegitimate children also take the nationality of the mother, if born in the national territory. See the rules followed by the countries of Latin-America in article by Arias in 11 Journ. of the Soc. of Comp. Leg. (1910), 132.

⁵ *Acosta y Foster (U. S.) v. Spain*, Feb. 12, 1871, Moore's Arb. 2462. It is possible, however, that the foreign country of birth might follow the general principle of international law of ascribing to an illegitimate child the citizenship of its mother.

⁶ *Guyer v. Smith*, 22 Md. 239; *Peck (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 2257; Hooper, W., *The law of illegitimacy*, London, 1911, 100 *et seq.*

⁷ The English rule appears to be the same, Moore's Dig. III, 287.

citizenship. On the one hand, it has been held that legitimation removes the defects of illegitimacy, and confers American citizenship upon the child of an American father and French mother who married after his birth.¹ On the other hand, there is some authority for the view that legitimation does not confer British nationality,² and this would appear to be the better opinion under the American law. Under § 1993 citizenship must be cast at birth. If the child is then not a citizen, he must be an alien, and any subsequent acquirement of citizenship must be through some form of naturalization. Legitimation, of course, is not a recognized form of naturalization, whence it would seem that the subsequent marriage of the parents cannot relate back to the moment of birth and make the child at the time of birth a legitimate child and an American citizen.

PARTNERS

§ 274. American Partners Associated with Aliens.

Owing to the conception of the severability of the interests of partners in partnership property, there seems to have been little difficulty, on the part of the Executive, in appeals for protection, and on the part of tribunals, in the adjudication of claims, in protecting the undivided interest of a partner, an American citizen, in a partnership claim in which his associates, for lack of citizenship or other reason, had no title to legal protection.

Cases have not been infrequent where the American partner in a firm in which other partners are foreigners has invoked American protection for the partnership property abroad. In such cases it has been held by the Executive that the right of protection is personal and not transferable, and that the citizen cannot, by connecting himself in business with the nationals of another country, spread over

¹ Mr. Hay, Sec'y of State, to Mr. Lardy, August 23, 1901, For. Rel., 1901, 512. See also *Dale v. Irwin*, 78 Ill. 170, a decision not well considered, H. Doc. 326, 59th Cong., 2nd sess., 142. The civil effects of legitimation are governed by the laws of the various states of the Union.

² *Shedden v. Patrick*, 1 McQueen H. L. 535; Hooper, *op. cit.*, 225. Under German law and the law of several other countries, *e. g.*, Austria, Switzerland, Finland, and Costa Rica, it is expressly provided that the marriage of an alien father to the national mother of an illegitimate child, the child being thereby legitimated, confers the father's nationality upon the child.

them the mantle of his own government, or enable them to invoke its protection. In a proper case, indemnity may be demanded for the injury to the American citizen, and the measure of indemnity would be the extent of the interest of the citizen in the partnership property.

§ 275. Decisions of International Tribunals of Arbitration.

International tribunals have on many occasions permitted one of several partners to recover for his undivided interest in partnership property, where it clearly appeared that the other partner or partners labored under a disability depriving him or them of standing before the commission, and this, notwithstanding the general rule that claims in favor of a partnership must be prosecuted by all the partners.¹ Thus, the citizen partners in a firm consisting partly of nationals and partly of aliens have been allowed by arbitral courts to recover their *pro rata* share of partnership claims.²

In several cases in which proof of loyalty or neutrality operated as a condition precedent to recovery, and such proof failed on the part of one or more of several partners, the decisions have not been uniform as to whether the innocent partners could recover their proportionate share of partnership claims. In a number of cases, the court acted on the presumption that the disloyal acts of one partner are imputable to the others, so as to bar recovery on a partnership claim.³ In other cases, the innocent partner was awarded his *pro rata*

¹ The rule has been applied by the Court of Claims to joint owners having several interests. *Fain v. U. S.*, 4 Ct. Cl. 237, 239.

² *Plumer, Adm. (U. S.) v. Mexico*, March 3, 1849, Opin. 182 (not in Moore); *Homan (U. S.) v. Mexico*, March 3, 1849, Moore's Arb. 3409 (partner suing alone held entitled to *pro rata* share only, although other partner may be equally entitled if he appears as claimant); *Jennings et al. (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3135 (*dictum*); *Ruden (U. S.) v. Peru*, Dec. 4, 1868, *ibid.* 1654; *Massardo et al. (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 706, 709; *Poggioli (Italy) v. Venezuela*, *ibid.* 847, 871; *Baasch and Römer (Netherlands) v. Venezuela*, Feb. 28, 1903, Ralston, 906, 910; *Henriquez (Netherlands) v. Venezuela*, *ibid.* 911 (no proof of interest of Dutch members of firm); *Peters (Gt. Brit. and Germany) v. Haiti*, 1913. See also *Hosford v. U. S.*, 29 Ct. Cl. 42 (suit under Indian Depredation Act of 1891). A German assignor for the benefit of creditors of a firm in which one partner was a Dane was nevertheless permitted to prosecute a partnership claim, inasmuch as he had the legal title. *Christern and Co., liquidators (Germany), v. Venezuela*, Feb. 13, May 7, 1903, Ralston, 597.

³ *Schreiner v. U. S.*, 6 Ct. Cl. 360, Nott, J., dissenting, (one disloyal partner,

share of the claim, his right being considered unimpaired by the disloyalty and disability to sue of his associate.¹

Attention has already been called to the rule of Anglo-American prize law which renders subject to confiscation the share of a partner in a commercial house established in a neutral country, when his own domicile is in enemy territory,² and operates to the same effect when the house is established in enemy territory, whatever may be the personal domicile of the partners.³ But the taint of belligerent domicile of a commercial partnership, does not reach the separate property of a partner having a neutral domicile.⁴

There is a certain type of partnership, the association *en nom collectif* or *en commandite simple*, which in civil law countries is regarded as a juristic person and a legal entity, separate and distinct from the individual members composing it,⁵ and possessing the nationality of the country of its organization or domicile. Civil law countries in

and two neutral alien partners, suing under Abandoned or Captured Property Act of March 12, 1863; the decisions in the Levois and Rochereau cases, *infra*, are squarely opposed); Hargous (U. S.) v. Mexico, March 3, 1849, Moore's Arb. 1280-1283; Lafer and Walley (U. S.) v. Mexico, *ibid.* 3340, 3342 (*semble*); McStea v. U. S., Second Alabama Claims Court, *ibid.* 2380; *dictum* (had it been a partnership transaction) in Levois v. U. S., Act of June 23, 1874, distributing Alabama award, *ibid.* 2357.

¹ U. S. v. Burns, 12 Wall. 246, 253 (under Act of March 3, 1863); Finn v. U. S., 4 Ct. Cl. 237, 239; Meldrim and Doyle v. U. S., 7 Ct. Cl. 595 (joint owners with several interests); Levois v. U. S., Act of June 23, 1874, Moore's Arb. 2352, 2357 (proof that claim did not arise out of partnership transaction, and claimant not responsible for partner's acts); Rochereau (France) v. U. S., Jan. 15, 1880, Boutwell's Rep. 124, Moore's Arb. 3739 (proof that claimant, non-resident alien, had no knowledge of purchase of certain Confederate bonds, bearing certain indicia of unneutral aid, by his partners in New Orleans).

² *Supra*, p. 559, especially Dana's Wheaton, § 535; Duer, Marine insurance, § 45; The *Antonia Johanna* (1816), 1 Wheat. 159.

³ The *Freundschaft*, 4 Wheat. 105; The *Cheshire*, 3 Wall. 231; The *William Bagaley*, 5 Wall. 377. See also treaty of April 30, 1803 between the U. S. and France, art. 5, Malloy, I, 514, cited by Andrade, Commissioner, in Finn (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 2349 (*dictum*). In Rodocanochi Sons and Co. v. U. S., Act of June 23, 1874, *ibid.* 2359, the nationality of a firm was considered that of the *locus* of its main house. Duer (I, 526), mentions an exception to the right of capture when the shipment from the hostile house of trade is made at the commencement of the war, and the partner is domiciled in neutral territory.

⁴ The *San Jose Indiano*, 2 Gall. 268; The *Sally Magee*, Blatch. Pr. Cas. 283; The *Aigburth*, *ibid.* 635.

⁵ This is in fact in accord with the old law of merchants.

which such firms have established themselves have usually denied the severability of the interests of the partners composing the firm, yet international commissions have in most cases admitted the separate claims of the individual partners for their undivided *pro rata* shares of the partnership property.¹

While a presumption is sometimes exercised that partners own equal shares,² claims commissions usually require a claimant partner to show the extent of his interest in the partnership.³

§ 276. Surviving Partners.

The principle of the common law⁴ which invests the surviving partner of a firm with the right to collect the debts of the firm has been applied in a number of cases before domestic and international courts.⁵ The rule, however, was considered without application to the claim of a British subject, appearing, before a commission having jurisdiction of claims of American citizens, as the surviving partner of a firm composed of an American citizen and a British subject, the tribunal stating that the rights of the American citizen, who alone was entitled to an award, passed to his personal representative and not to his surviving alien partner.⁶

¹ Ruden (U. S.) *v.* Peru, Dec. 4, 1868, Moore's Arb. 1653; Cerruti (Italy) *v.* Colombia, Aug. 18, 1894, For. Rel., 1898, 245, Moore's Arb. 2117; Alsop and Co. (U. S.) *v.* Chile, Dec. 1, 1909, Award July 5, 1911, 5 A. J. I. L. 1079.

The entity was regarded as inseparable in Chauncey (U. S.) *v.* Chile, No. 4, May 24, 1897, Report, 1901, p. 22; see dissenting opinion by American commissioner. The subsequent Alsop protocol and award (*supra*) practically reverses this decision. Brewer, Moller and Co. (Germany) *v.* Venezuela, Feb. 13, May 7, 1903, Ralston, 595.

² As to joint owners, see *The Schooner Nantasket*, 39 Ct. Cl. 119.

³ Henriquez (Netherlands) *v.* Venezuela, Feb. 28, 1903, Ralston, 911; Finn (U. S.) *v.* Venezuela, Dec. 5, 1885, Moore's Arb. 2348; Headman *v.* U. S., 5 Ct. Cl. 604.

⁴ Burdick, F. M., *The law of partnership*, 2nd ed., Boston, 1906, 139 *et seq.*

⁵ Douglas *v.* U. S., 14 Ct. Cl. 1; Labadie, Adm., *v.* U. S., 33 Ct. Cl. 476; Stewart, Adm., *v.* U. S. (French spoiliations), 27 Ct. Cl. 221 (notwithstanding fact that surviving partner was not a member of firm when the loss occurred); Garrison (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 1356, 3129 (Award by Lieber, Umpire, to American citizen, when no evidence introduced to show deceased partner was not an American citizen); Levois *v.* U. S., Act of June 23, 1874, Moore's Arb. 2358.

⁶ Morrison, surviving partner of Plumer and Morrison (U. S.) *v.* Mexico, March 3, 1849, *ibid.* 2326 (last part *dictum*).

CORPORATIONS

§ 277. Citizenship of Corporations.

The nationality of corporations is one of the most actively discussed questions of the law of continental Europe.¹ While some writers dispute the possibility of corporate nationality, the fact that the legislation of practically all countries takes account of foreign corporations, has persuaded publicists to endeavor to establish the criteria of a national corporation. In some countries, little help is obtained from positive legislation.

A corporation may be attached to a territory by three elements. The first is the place where it is created or founded, where the legal formalities of its constitution, authorization and inscription have been carried out. The second is the place where the home office, the active management or center of administration, or what the French call the *siège social* is located. The third is the place where it carries on the purpose of its organization, its actual operations, its center of exploitation (*principale exploitation*).²

When these three elements are combined in one country, it is hardly open to question that the corporation has the nationality of that country.³ But when the three elements or some of them are located in

¹ Mamelok, A., *Die juristische Person im internationalen Privatrecht*, Zurich, 1900, 211 *et seq.*; Pillet, A., *Des personnes morales en droit international privé*, Paris, 1914; Isay, Ernst, *Die Staatsangehörigkeit der juristischen Personen*, Tübingen, 1907; Leven, M., *De la nationalité des sociétés et ses effets juridiques*, Paris, 1900, 199 *et seq.*; Fromageot, H., *De la double nationalité des individus et des sociétés*, Paris, 1892, 114-121; Lyon-Caen in 12 *Clunet* (1885), 265-274; Lainé in 20 *Clunet* (1893), 273 *et seq.*; Arminjon in 4 R. D. I., n. s. (1902), 381 *et seq.*; translated into English by William E. Spear, Clerk, Spanish Treaty Claims Com., Washington, 1907, Document 53; Marais and Barclay in 23rd Report, International Law Asso. (1906), 360-372; Jacobi in 27th Rep. *ibid.* 368-380, Baumgarten in 28th Rep., *ibid.* 246-254 and D. J. Trias y Giro, 28th Rep. *ibid.* 270 *et seq.* 1889 and 1900 Congrès international des sociétés par actions, Paris, 1889 and 1900. See also the general works on private international law by Bar, Fiore, Weiss, Vareilles-Sommières, Brocher, Surville and Arthuys, Asser-Rivier, Despagnet and Rolin, and the French treatises on commercial law by Thaller, Lyon-Caen and Renault, Houpin and Rousseau.

² Jitta, J., *La substance des obligations dans le droit international privé*, La Haye, 1906, I, 343 *et seq.*

³ Driefontein Cons. Gold Co. v. Janson (1900), 2 Q. B. 339, 346, S. C. [1902], A. C. 484, 490; Foote, *Foreign and domestic law*, 3rd ed., 144.

different countries, the nationality of the corporation is not always easy to determine. Taking into consideration the three factors mentioned and some others, the following systems as to the determinative criterion of the nationality of a corporation have all had their adherents: It is governed (1) by the nationality of the state which authorizes its existence (Fiore and Weiss); (2) by that of the state within whose jurisdiction it has been organized (Brunard and Cassano); (3) by the nationality of the stockholders (Vareilles-Sommières); (4) by that of the country of subscription or domicile of the majority of the stockholders at the time of subscription (Thaller); (5) by that of the country where it has its principal place of business, a system followed, with variations, by the legislation of most countries; (6) the jurisdictional judge may determine the nationality on all the facts.¹ Other solutions have been offered, *e. g.*, that the will of the corporation or of the state should alone determine its nationality.

Leaving aside all theoretical arguments, it may be said that the majority of states in their legislation have accepted the country of domicile (*siège, Sitz*) as the nationality of the corporation. The question then arises, is the domicile the center of administration, the "home office," or is it the center of exploitation, where the business is carried on. Among the countries of Europe—with the exception of Spain, which attributes Spanish nationality to corporations incorporated in Spain or administered from, or doing business in Spain, and of Italy, Portugal and Roumania, which consider as domestic corporations those doing business within their borders (center of exploitation)²—the majority adhere to the system by which nationality follows the country in which the center of administration (the *siège social*) is located.³

¹ Arminjon in Spear's translation, *supra*, 8-18.

² This principle appears to be favored by Lyon-Caen, Boistel, Asser and Rivier. Fromageot, *op. cit.*, p. 118. See also Lyon-Caen and Renault, *op. cit.*, II (Des sociétés), 4th ed., § 1167, p. 577.

³ This is the system approved by the Institute of International Law, with the qualification that the *siège social* be real and actual, and not fictitious and fraudulent (11 *Annuaire*, 151 *et seq.*; see also 9 *Annuaire*, 376 and 10 *Annuaire*, 153-156) and by the Congress of Corporations at its 1889 Paris session. See also Diena, G., *Trattato di diritto commerciale internazionale*, Firenze, 1900, I, § 37, and the decisions of French courts cited by Boeck in 20 R. G. D. I. P. (1913), 352. The International Law Assn. has expressed itself to the effect that the domicile of a foreign corporation

§ 278. Anglo-American Law.

In Anglo-American law no such theoretical conflicts as have prevailed in continental law appear to have found a place. The conception of domicile with respect to corporations has been applied in cases of taxation and of belligerent rights and for these purposes, the seat of the corporation has on occasion been considered the place where the business is carried on.¹ For other purposes, the question of domicile and nationality is decided by practical considerations, the most important of which is the place of incorporation.

In the United States the citizenship of corporations is judged almost exclusively according to the place of incorporation, which involves, in most municipal cases, the determination of state citizenship. Only thirteen states even require residence on the part of any of the incorporators and only six require state citizenship. New York appears to be the only state demanding United States citizenship. While the courts have made numerous distinctions between natural persons and corporations in the matter of citizenship, they have held a corporation to be a citizen for the purposes of suit under the federal constitution,² and under the Act to provide for the adjudication and payment of claims arising from Indian depredations.³ The Supreme

shall be deemed the place of its incorporation, 22nd Report (1905), p. 250. This substitution of place of incorporation for *siège social* was also recommended by Judge Neukampf in the Verhandlungen der ersten Hauptversammlung der Int. Ver. f. vergl., Rechtswissenschaft at Heidelberg, Sept., 1911, Berlin, 1912, 203-226 and discussion 227-232.

The legislative system of the various countries is outlined in Isay, *op. cit.*, 214-224, and is discussed in the other works cited in note 1 (*supra*, p. 617).

See the award of the Hague Court of Arbitration in Canevaro (Italy) *v.* Peru, April 25, 1910, 6 A. J. I. L. (1912), 746, and Boeck in 20 R. G. D. I. P. (1913), 349 *et seq.*

¹ Foote, *op. cit.*, 3rd ed., 143; Martine *v.* Int. Life Ins. Soc., 53 N. Y. 339 (a British insurance company with a permanent agency in New York and doing business there, was considered domiciled in New York, for belligerent purposes). Recent decisions in Great Britain have confirmed the rule that for purposes of suit the nationality of a corporation is that of the place of incorporation, regardless of the nationality of the stockholders. Continental Tyre and Rubber Co. *v.* Daimler [1915], 1 K. B. 893 (alien enemy stockholders in British corporation). See criticism by J. E. Hogg in 31 Law Quar. Rev. (1915), 170-172.

² Muller *v.* Dows, 94 U. S. 444.

³ United States *v.* Northwestern Express Co., 164 U. S. 686 (Act of March 3, 1891).

Court, moreover, has held that for jurisdictional purposes there is a conclusive presumption of law that the persons composing the corporation are citizens of the same state with the corporation,¹ and "although an artificial person," a corporation is "to be considered as a citizen of the state as much as a natural person."

While it has been held that a corporation could be an alien enemy as well as an individual, it has not been definitely established whether the place of incorporation governs enemy character, or whether this is determined according to each place where the corporation has a branch and does business. In earlier cases, the place of actual business has been held to control;² more recently, however, it has been held in England that the place of incorporation and registration, and not the place of operation governs.³ The British proclamation of September 9, 1914, in regard to trading with the enemy, provides that in the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country. On the other hand, for the purposes of the effect of war on patents, designs and trade-marks, a British corporation controlled by or carried on wholly or mainly for the benefit of subjects of an enemy state, was to be deemed an alien enemy.

§ 279. Diplomatic Protection of American Corporations. Conditions.

In the matter of diplomatic protection, the United States⁴ and Great Britain⁵ have considered themselves entitled to interpose in behalf of a corporation incorporated under its laws or those of a constituent state, on the theory that the company is clothed with the

¹ *Louisville, etc., Railroad v. Letson*, 2 How. 497, 558; *St. Louis and San Francisco Ry. Co. v. James*, 161 U. S. 545, 562.

² *Martine v. Int. Life Ins. Soc.*, 53 N. Y. 339.

³ *Nigel Gold Mining Co. v. Hoade*, 70 L. J., K. B. 1006 [1901], 2 K. B. 849. The note in 15 *Harvard Law Rev.* 237 on this case is most confusing. *Continental Tyre and Rubber Co. v. Daimler* [1915], 1 K. B. 893. In support of the place of incorporation as the test see the *Pedro* and the *Guido*, 175 U. S. 354 and 382; *Robinson Gold Min. Co. v. Alliance Ins. Co.* [1901], 2 K. B. 919, and the following prize cases: *The Manchuria*, Russian and Japanese Prize Cases, II, 52; *The Tommi*, L. R. [1914], Probate, 251; *The Roumanian*, L. R. [1915], Probate, 26. See also Russell T. Mount in 15 *Columbia L. Rev.* (1915), 332-333.

⁴ *Moore's Dig.* VI, § 984. Mr. Knox, Sec'y of State, to Mr. Arnold, Apr. 25, 1910, *For. Rel.*, 1910, 197.

⁵ Lord Palmerston to Mr. Droucy, President of the Swiss Confederation, October 16, 1859, reprinted in *For. Rel.*, 1873, II, 1348.

nationality of its creator, regardless of the citizenship of the bondholders or stockholders.¹ General claims conventions concluded by the United States usually provide for the adjudication of "all claims on the part of corporations, companies or private individuals, citizens of the United States," or the other claimant government. Even where the protocol was confined to "citizens" or "subjects," it has been held by arbitral commissions to include corporations duly organized under the laws of the claimant government.²

While American incorporation, therefore, affords a *prima facie* title to American protection, no hard and fast rules governing protection can be laid down. The Department of State, in the exercise of its discretion, requires evidence of the substantial American interest in a corporation before protection is authorized. Thus the Department uniformly requires the party in interest to place on file a properly certified copy of the charter or articles of incorporation, together with a duly executed instrument setting forth the ownership—legal or equitable—of the stock and bonds of the corporation, including such a statement of the nationality of the holders as will show in whom the greater part of the real beneficial interest lies. Complete American ownership of the stock or bonds is by no means required. When there is reason to believe that American incorporation was sought merely for the purpose of securing American protection for what is in fact a foreign-owned enterprise, the Department is loath to extend its protection to the corporate entity. Such protection has been refused in cases where the incorporators were all aliens or where the majority of the stock was owned by nationals of the country against which protection was sought, or where the corporation has not been considered to represent sufficient American interests.³ In a case where four-fifths

¹ *Chauncey (U. S.) v. Chile*, Case No. 4, May 24, 1897, U. S. and Chilean Comm. Rep., 1901, 22; For. Rel. 1910, 197.

² *Stirling (Gt. Brit.) v. Chile*, No. 4, Sept. 26, 1893, Reclamaciones pres. al Trib. Anglo-Chileno, I, 128, 152, dissenting opinion by Commissioner Aldunate, *ibid.* 163-187; *Rosario Nitrate Co., Ltd. (Gt. Brit.) v. Chile*, *ibid.* I, 306, 338; *Comp. Consig. du Guano (France) v. Chile*, Award July 5, 1901, Descamps and Renault, Rec. int. des traités, 1901, p. 367. See also *U. S. v. Northwestern Express Co.*, 164 U. S. 686; *Dictum contra* by Deemer, J., in *Scottish U. and N. Co. v. Herriott* (1899), 109 Iowa, 606, 617.

³ *Mr. Adee to Consul Bergholz*, Oct. 12, 1909, For. Rel., 1909, 67. See also

of the American-owned stock in an American corporation had, after the origin of the claim, passed into foreign hands, it was considered within the discretion of the Secretary of State to divide the claim and prosecute to satisfactory adjustment only the *bona fide* American interest in the claim.

Again, while a duly organized American corporation is subject to American consular jurisdiction in China and is entitled to registration as such, this does not necessarily imply that the corporation is entitled to the diplomatic protection of the United States.¹

§ 280. Foreign Corporation Substantially Owned by American Citizens.

In the obverse case, a foreign corporation will not be denied protection, if a substantial interest in the corporation is owned by American citizens. Here again, it is impossible to lay down a rule as to the proportion of stock which must be owned by American citizens. The Department in the exercise of its discretion will look behind the corporate entity to determine the nationality of the real parties in interest. While there are many reasons in legal theory for declining to protect an American stockholder in a foreign corporation, so long as the corporation is a going concern—and the United States has, at times, on palpably valid legal grounds declined its protection in such cases,²—the government has on numerous occasions intervened on behalf of foreign corporations when it appeared that a substantial proportion of the stock was owned by American citizens.³ In this practice, it has apparently been sustained by arbitral decisions.⁴

In the case of a large American stock-holding interest in a foreign corporation doing business in a third country, the Department has *ibid.* 65. See also Leval, G. de, *La protection diplomatique*, Bruxelles, 1907, §§ 40–41.

¹ Mr. Knox, Sec'y of State, to Consul Arnold, Apr. 25, 1910, For. Rel., 1910, 198.

² *E. g.*, in the celebrated *Antioquia* case, Moore's Dig. VI, 644–646.

³ See cases in Moore's Dig. III, 647–651; *Orinoco S. S. Co. (U. S.) v. Venezuela*, Sen. Doc. 413, 60th Cong., 1st sess., 71.

⁴ In *McMurdo v. Portugal*, June 13, 1891, Moore's Arb. 1865 *et seq.*, For Rel., 1900, 903; in *El Triunfo* (Salvador Commercial Co.) *v. Salvador*, Dec. 19, 1901, For. Rel., 1902, 862–873 and in *Alsop v. Chile*, Dec. 1, 1909, Award July 5, 1911, p. 9. The protocol may be considered an authorization for these decisions. See von Bar's comments in his opinion on the *Salvador Commercial Co. case* published in 45 *Jhering's Jahrbücher* (1903), 161, 192.

occasionally instructed the American minister in the third country to use his informal good offices on behalf of the American interest by supporting the representations of the diplomatic representative of the country in which the company had been incorporated. Good offices are in fact frequently employed directly against a foreign government, the incorporator of a company in which an American citizen is a substantial stockholder.¹ Protection has been refused as against such a government when three-fourths of the stock appeared to be owned by citizens of that government. Protection has also been refused to an American corporation, owning the bulk of the stock of a Mexican corporation, in the interest of a vessel of the Mexican corporation flying the Mexican flag.

§ 281. Rule of International Tribunals.

International tribunals which have passed upon the matter have held in many cases that the nationality of the corporation and not of its stockholders governs the jurisdiction of the commission.² On the other hand, citizens of the claimant government, stockholders in³ or representing as liquidator⁴ a solvent corporation formed under

¹ Good offices have been employed on behalf of subsidiaries of great American corporations, the subsidiaries being incorporated and domiciled in foreign countries. See also 27th Rep. Int. Law Asso. (1912), 379, paper of Mr. Jacobi.

² *Comp. Gén. des Eaux (Belgium) v. Venezuela*, March 7, 1903, Ralston, 271, 276; *Narcisa Sugar Co. v. U. S.*, No. 139, Span. Tr. Cl. Com., Briefs and Explanatory notes, v. XXIV, 167.

³ In two cases coming before a Commission to consider the claims of "British subjects" upon France, it was held that a corporation organized by British subjects in France, and under the control of France, was a "French establishment" and not within the meaning of the term "British subjects." *Daniel v. Commissioners for Claims on France*, 2 Knapp's P. C. Rep. 23, and *Long v. Commissioners*, 2 *ibid.* 51. In the first case, the corporation was formed for objects not permitted by British law, although this did not affect the legal point above mentioned. Nor were British subjects, as individuals, allowed to recover for injuries to the corporate property. See Phillimore, 2nd ed., III, § 578, p. 859; *Baasch and Römer (Netherlands) v. Venezuela*, Feb. 28, 1902, Ralston, 906 (the claim of Dutch stockholders in a Venezuelan corporation, which sustained the damage, denied). See also *Henriquez (Netherlands) v. Venezuela*, *ibid.* 910; *Brewer, Moller and Co. (Germany) v. Venezuela*, Feb. 13, May 7, 1903, Ralston, 595, 597 (claim of a German partner in a Venezuelan corporation, which sustained injury, denied). See also *Accessory Transit Co. (U. S.) v. Costa Rica*, July 2, 1860, Moore's Arb. 1560.

⁴ *Chauncey (U. S.) v. Chile*, No. 3, May 24, 1897, Report of Commission 1901, 19,

the laws of the defendant government, were denied standing before arbitral commissions, when attempting to enforce a corporate claim.

That the nationality of the corporation rather than that of the stockholders must control the jurisdiction of international tribunals in claims growing out of corporate losses appears evident from the fact that the corporation, the trustee, possesses the entire legal and equitable title to a claim as part of the assets of the corporation, whereas the stockholder possesses only an equitable right, enforceable in a court of equity, to an accounting and to compel the proper management of the company by its directors. The stockholder, therefore, having no legal title to the corporate property of a solvent corporation, can hardly be recognized by an arbitral tribunal acting under the usual form of protocol as a proper party claimant, and only under exceptional protocols, as will presently be noticed, has this been done. While it is possible for a government, therefore, to prosecute the claim of a national corporation from which foreign stockholders will indirectly derive a benefit, "the inconvenience on the one hand," as was said by the Supreme Court,¹ "is completely destroyed by the overwhelming preponderance of inconvenience which would exist on the other; for, doubtless, whilst the alien corporator may be an exception, the corporator, who is both a citizen of the state and a citizen of the United States, is the rule. To follow the argument, therefore, would make the exception dominate and destroy the rule."

30. (American citizens formed a company "en comandita" under Chilean law, by which this company, although a partnership in American law, was regarded as a juristic entity with Chilean nationality; jurisdiction was therefore denied.) When this case was subsequently submitted to arbitration (Alsop and Co., U. S., v. Chile, December 1, 1909), His Britannic Majesty as *Amiable Compositeur* held that the terms of submission obviated an examination into the nationality of the copartnership, the claim having been submitted by both Governments as that of American citizens. U. S. Counter Case, 64-70, Award, July 5, 1911, p. 9. In the civil law, there are various kinds of associations or partnerships, recognized as juridical persons and entities distinct from the members composing them, *e. g.*, a partnership with a collective name, a partnership with special partners, an anonymous society or stock corporation (*société anonyme*), a society with special partners by shares, and co-operative societies.

¹ U. S. v. Northwestern Express Co., 164 U. S. 686, 690.

§ 282. Effect of Citizenship of Stockholders upon Jurisdiction of International Tribunals.

The question as to whether American corporations having foreign stockholders could be admitted as "citizens" for the full value of the claim, or only for the proportion of stock held by American citizens was exhaustively argued in several cases before the Spanish Treaty Claims Commission.¹ The Government contended that only the American stockholders in American corporations could recover, and asked the Commission to penetrate the fictitious person known as the corporation and apportion the damages.² The Commission declined to apportion the corporate damages, but decided

"that a corporation may prosecute a claim to adjudication and [the Commission] reserves the right to determine, on final consideration, in case a claim is established, whether any part of the award shall inure to the benefit of a shareholder who, as an individual, could not have prosecuted a claim to adjudication" (*i. e.*, foreign stockholders in an American corporation).³

It appears, in the few cases in which awards were made to American corporations, that no reduction was made because of the alien ownership of some of the shares of stock.⁴

In the case of *Barron v. the United States*, before the Mexican-United States commission of 1868,⁵ Umpire Lieber held that the British successors in interest of a Mexican corporation must stand upon their own nationality as British subjects. In a peculiar *dictum*, admitting the possible continued existence of the corporation, he intimated that corporate organization could not cloak the real nationality of the actual British claimants.

In two well-reasoned opinions in the Kunhardt claim against Venezuela,⁶ it was held that the stockholders of a going corporation, not being co-owners of the corporate property, cannot prosecute a cor-

¹ Tuinucu Sugar Co., No. 240, Hormiguero Central Co., No. 293, Mapos Sugar Co., No. 121, Victoria Co., No. 141, Rosario Sugar Co., No. 341, Briefs, VI, 249-370.

² Fuller's Special Report, 1907, 28-31.

³ Order No. 504, Feb. 3, 1904, sustaining demurrer to the government's plea in abatement.

⁴ Narcisa Sugar Co., No. 139, Briefs XXIV, 167 (explanatory notes).

⁵ *Barron (Mexico) v. U. S.*, July 4, 1868, Moore's Arb. 1520, 1523.

⁶ *Kunhardt (U. S.) v. Venezuela*, Feb. 13, 1903, Ralston, 63, opinions of Bainbridge and Paul. See also *Hernsheim v. U. S.*, No. 297, Span. Tr. Cl. Com., 4 A. J. I. L. 815.

porate claim on the part of the corporation or themselves. After dissolution of the corporation, however, they became equitable owners, in proportionate parts, of the corporate property, subject, however, to the payment of the corporate debts. Kunhardt and Co., therefore, were given a standing as the American owners of stock in a dissolved Venezuelan corporation but damages were not assessed in their favor owing to lack of evidence of the corporate liabilities.

In the Delagoa Bay arbitration¹ and the Salvador Commercial Company case,² a thorough examination into the question of the right of American stockholders in a foreign corporation to prosecute claims for their share of the losses of the corporation was precluded by the terms of the protocol, which made the shareholders the parties claimant. It may be said, however, that the foreign corporations in both cases were practically defunct, and the equitable interest of the stockholders could with some justice be supported, as it was, by their government. In the cases of Cerruti against Colombia³ and Alsop against Chile,⁴ claimants were members of a firm established under the laws of the defendant government and by its law regarded as a juridical person and national entity. President Cleveland in the first case and his Britannic Majesty in the second considered themselves empowered, under the terms of submission, to award indemnities to the individual firm members on whose behalf the claimant government, of which they were citizens, prosecuted the claim.

¹ *McMurdo (U. S.) v. Portugal*, June 13, 1891, *Moore's Arb. 1865 et seq.*, *For. Rel.*, 1900, 903.

² *Salvador Commercial Co. (U. S.) v. Salvador*, Dec. 19, 1901, *For. Rel.*, 1902, 857, 862-873.

³ *Cerruti (Italy) v. Colombia*, Aug. 18, 1894, *For. Rel.*, 1898, 245. The Government of Colombia protested against the award of President Cleveland, as arbitrator, so far as the debts of the firm of Cerruti and Co. were concerned, and in fact refused to execute that part of the award. Long and acrimonious negotiations ensued, although Colombia finally executed the award. The Cerruti claim is discussed by Bureau in his work *Le conflit italo-colombien (affaire Cerruti)*, Paris, 1899, by Darras in 6 *R. G. D. I. P.* (1899), 533-552 and by Pierantoni in 30 *R. D. I.* (1898), 445-462. Controversies growing out of the execution of the award led to another arbitration between Italy and Colombia under a protocol of Oct. 28, 1909. See Award of July 6, 1911 in 6 *A. J. I. L.* (1912), 1018-1029, and Francis Hagerup's Report in 19 *R. G. D. I. P.* (1912), 268-274.

⁴ *Alsop and Co. (U. S.) v. Chile*, Dec. 1, 1909, 5 *A. J. I. L.* (1911), 1079.

CHAPTER V

SUCCESSORS IN INTEREST AND BENEFICIAL OWNERS

§ 283. Effect of Citizenship of Derivative Claimants.

The rules of municipal law authorizing successors in interest of original claimants to invoke the rights and pursue the remedies of their predecessors are tempered in the prosecution of international claims by such questions as the national status of the successors and their rights under international conventions to represent the original claimants. The rules of the Department of State also require that a person who claims in the right of another shall show "whether such other was a citizen when the claim had its origin." Among successors in interest, special consideration will be given (a) to heirs, (b) to executors and administrators, including personal representatives, and (c) to assignees and receivers. The rights of beneficial owners, including creditors, mortgagees and insurers, will be considered separately.

HEIRS

§ 284. Citizenship of Decedent and Heir Usually Required.

Some consideration has already been given, under the head of widows and children,¹ to the right of heirs to institute international claims in their own behalf. No uniform rule in the matter can be invoked, but general practice sanctions the requirement that the heir prove both his own and the decedent's citizenship as a necessary condition to diplomatic interposition in his behalf. The failure of proof under either head will usually deprive the claim of diplomatic cognizance, although cases have been cited in which widows have, regardless of their own citizenship, obtained diplomatic relief for injuries inflicted upon their deceased husbands.² As a general rule, however, to justify

¹ *Supra*, § 268.

² *Ibid.*

the presentation of a claim, the heirs must be of the same nationality as the ancestor, the original claimant.

In case the claimant dies in the course of diplomatic negotiations for redress, the prosecution of the claim will not usually cease, provided the right of action is deemed to survive. This is so, on principle, regardless of proof of heirs, because the claim had already assumed a national character. In the Shields case against Chile, in which the death, some years after the claim was first instituted, of a British seaman who had served on an American vessel, may be considered to have divested the United States of all interest in the claim, a protocol of agreement to settle the claim was concluded between the United States and Chile on behalf of the heirs of Shields.¹

§ 285. Decisions of International Tribunals of Arbitration.

In determining the right of heirs to appear as claimants before international commissions, it is essential to examine the jurisdictional clause of the protocol or treaty under which the commission acts. For example, the fact that article 2 of the treaty of 1880 between France and the United States provided for the examination of claims "presented to [the Commission] by the citizens of [France]" was held to justify the rejection of the claim of Wiltz, public administrator of the estate of a French citizen, in the absence of proof of the French citizenship of the real and beneficial claimants who through him actually presented the claim.² In fact, under the general form of protocol for the adjudication of the claims of the citizens of one country against the other, international tribunals have generally held that not only the deceased but the actual beneficiary must come within the jurisdiction of the commission in the matter of citizenship. Heirs, therefore, have been required to establish their jurisdictional citizenship independently of their ancestor, failing which their claims have been rejected.³ When the claim was national in origin, but passed into the

¹ May 24, 1897, Malloy's Treaties, I, 190; \$3,500 was paid to the U. S. For. Rel., 1900, 67.

² Wiltz (France) v. U. S., Jan. 15, 1880, Moore's Arb. 2243, 2246; Mrs. Grayson, Adm. (Gt. Brit.), v. U. S., Feb. 8, 1871, Hale's Rep. 19 (only British-owned portion of claim allowed, claim on part of widow, American citizen, being disallowed).

³ Lizardi (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 1353; Maxan's Heirs (U. S.)

hands of an alien heir, it has usually been dismissed on the principle that a claim must be national in origin as well as at the time of presentation,¹ although we shall presently notice certain exceptions to this rule. When the claimant was the heir and himself a citizen, but the person who sustained injury was an alien, and not within the jurisdiction of the commission, the claim was likewise rejected under the general principle, and on the special ground that an heir could not inherit more rights than his ancestor possessed.²

In several cases where the claimant died *after* the presentation of his claim, and before the award, his rights were considered to have vested in his heirs, regardless of their own nationality.³ In the Betancourt case before the Spanish Treaty Claims Commission, claimant died intestate in 1904, *i. e.*, after the ratification of the treaty of Paris, and his personal representative was substituted. The original claimant having been a citizen of the United States, the commission made an award to the "personal representative," regardless of the nationality of the heirs, who indeed were in part Spanish.⁴

Contrary to the general rule that an international tribunal will look behind the executor or administrator representing the estate of a deceased national and seek to ascertain the nationality of the

v. Mexico, *ibid.* 2485; Wulff (U. S.) *v. Mexico*, *ibid.* 1354 ("direct recipients of the award" must be citizens); Chopin (France) *v. U. S.*, Jan. 15, 1880, *ibid.* 2506; Levy (France) *v. U. S.*, *ibid.* 2514; Heirs of Massiani (France) *v. Venezuela*, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 211, 242; Heirs of Maninat, *ibid.* 44, 75; Stevenson (Gt. Brit.) *v. Venezuela*, Feb. 13, 1903, Ralston, 438, 455; Poggioli (Italy) *v. Venezuela*, Feb. 13, 1903, Ralston, 847, 866; Brignone (Italy) *v. Venezuela*, *ibid.* 710, 719; Miliani (Italy) *v. Venezuela*, *ibid.* 754, 762. See also *Burthe v. Denis*, 133 U. S. 514, and *Mrs. Bodemüller's case*, 39 Fed. 437 (*dictum*). Before the Southern Claims Commission, heirs had to establish their jurisdictional loyalty, independently of their ancestor. Second Gen. Rep., H. Misc. Doc. 12, 42nd Cong., 3rd sess., 3.

¹ *Infra*, § 306 *et seq.*

² Foulke, Adm. (Cisneros), U. S. *v. Spain*, Feb. 12, 1871, Moore's Arb. 2334; Diaz *v. U. S.*, No. 300, Span. Tr. Cl. Com. (claimant's father died before treaty of 1898). Briefs, etc., XXIV, 136. See Ralston's remarks in *Corvaia (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 782, 809.

³ Chopin (France) *v. U. S.*, Jan. 15, 1880, Moore's Arb. 2506, Boutwell's Rep. 88; Stevenson (Gt. Brit.) *v. Venezuela*, Feb. 13, 1903, Ralston, 438, 455.

⁴ Betancourt *v. U. S.*, No. 466, Fuller's Special Rep., 1907, p. 44. See Mr. Fuller's explanatory note.

heirs or creditors, there have been some cases in which the commission has not apparently considered it necessary to inquire into the nationality of the prospective beneficiaries of an award, but has taken jurisdiction on the ground that the deceased national came within the terms of the protocol—and this without regard to the nationality of the executor or administrator.¹ There is much to be said in support of this view. If it is the injury to the state in the person of its citizen which justifies diplomatic interposition, the mere fact that the claim subsequently by operation of law passes into the hands of alien heirs would not seem to modify the injury to the state. Moreover, the award when received is a national fund, to be distributed by the government as it deems proper. It might, in its discretion, exclude aliens from participation in the distribution.

§ 286. Law Governing Distribution of Estate.

The determination of the persons who are heirs and the rule which shall govern in the distribution of a decedent's estate is in Anglo-American law and in a few of the continental countries governed by the law of the domicile of the decedent, but is in most civil law countries governed by his nationality.² The confusion to which these conflicting principles have given rise has been pointed out in a number of works on the municipal law of succession.³ In an unratified convention, drafted at The Hague, July 17, 1905, to regulate conflicts of law in the matter of succession, the majority of the countries of Europe agreed

¹ Halley, Adm. (Gt. Brit.), *v. U. S.*, Feb. 8, 1871, Hale's Rep. 20, Moore's Arb. 2241 (the opinion is not altogether clear). See dissenting opinion by Frazer, 2242; Willet, Adm. (U. S.) *v. Venezuela*, Dec. 5, 1885, *ibid.* 2254; *Executor of Peck (U. S.) v. Venezuela*, *ibid.* 2257. See also Alsop (U. S.) *v. Chile*, Dec. 1, 1909, U. S. Counter Case, 191-192, Award July 5, 1911. *Semble*, Piton (France) *v. Venezuela*, Feb. 19, 1902, S. Doc. 533, 59th Cong., 1st sess., 462.

² Bentwich, Norman, *The law of domicile in its relation to succession*, London, 1911, 189 *et seq.*

³ Contuzzi, F. P., *Il diritto ereditario internazionale*, Milano, 1908; Raison, E., *Traité des successions d'étrangers*, Paris, 1911; Pilet, Raymond, *Des successions dans le droit international privé*, Rennes, 1885; Burgin, E. L., *Administration of foreign estates*, London, 1913; Bridel, Louis, *Succession légale comparée*, Tokio, 1909; Fildermann, W., *Les successions en droit comparé*, Paris, 1909; Roguin, E., *Traité de droit civil comparé; Les successions*, v. IV and V, Paris, 1912.

that in regard to the matter of heirship, the disposable share and representation, the national law of the deceased should govern, regardless of the nature and situation of the property, but the principal countries which follow the rule of domicile were not represented.

In the few cases which have come before international commissions, the law of the last domicile was held to govern in the distribution of a personal estate.¹ In a case where certain American heirs brought a claim against Great Britain on account of moneys of an English woman held by that government in trust for the heirs, it may be inferred from the argument that a duly qualified administrator should have appeared as claimant, the claim being dismissed on the ground that no case had been found where a government had interfered with questions of succession in other jurisdictions.² The administrator has been held to be the proper party claimant on behalf of a personal estate,³ when the law of the domicile so provides, and especially when it appears that there are creditors of the estate. This is in accordance with the common law principle, adopted in most of the states, that the administrator takes the legal title to personal property, and not the heir or legatees.⁴

Under the French Spoliation claims, it was held that Congress, in giving preference to next of kin, intended that the next of kin living at the date of the appropriation act of 1891, and those determined as such by the statutes of distribution of the respective states of the domicile of the original sufferers are the persons entitled to an award, to the exclusion of creditors, legatees, and assignees, strangers to the blood.⁵ The Court of Claims merely determined the validity and amount of the claims, whereas Congress decided who is equitably

¹ *Brignone (Italy) v. Venezuela*, Feb. 13, 1903, *Ralston*, 719 (both laws recognized that succession opens at the place of the last domicile, where claimant died and his property was situated); *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *ibid.* 455 (domicil was place of death).

² *Cook (U. S.) v. Great Britain*, Feb. 8, 1853, *Moore's Arb.* 2313, 2315.

³ *Bodemüller v. U. S.*, 39 Fed. 437; *Baynum (U. S.) v. Mexico*, March 3, 1849 and other cases, *Moore's Arb.* 1271. See also *infra*, § 287.

⁴ *Hamner's case*, 13 Ct. Cl. 7, where a son, as distributee of his father's estate, was held not entitled to maintain a suit under the Abandoned or Captured Property Act.

⁵ *Blagge v. Balch*, 162 U. S. 439.

entitled to participate in the award.¹ The same conclusion was reached by Justice Story in the celebrated case of *Comegys v. Vasse*, as to the function of the commissioners under the treaty of 1819 with Spain, passing upon claims against Spain.²

§ 286a. Survivorship of Claims.

Commissions have occasionally had to determine the class of claims which survived the death of a claimant. In one such case, the matter was held to be governed by the law of the domicile, according to which claims for bodily injuries passed to the heirs, but those for injuries to feelings or reputation died with the person.³ In certain cases before the British-American commission of 1871, claims were allowed to personal representatives for injuries resulting in death, notwithstanding the fact that neither the law of the United States nor Great Britain awarded damages for death by wrongful act.⁴ In several cases, awards for death by wrongful act appear to have been made, without question, to the heirs of the deceased, without any contention that the claims should have been presented by an administrator.⁵ There has been a case, however, in which the right to obtain damages for personal injuries has been held to die with the person, and not to survive to the heir or administrator.⁶

In claims arising out of injuries to person or property, it is the better practice for the administrator to represent the estate of the deceased, although the widow and children in their characters as such may in addition pursue their claims for losses.

¹ *Buchanan, Adm., v. U. S.*, Act of Jan. 20, 1885, 24 Ct. Cl. 74.

² *Comegys v. Vasse*, 1 Pet. (26 U. S.), 193.

³ *Metzger (Germany) v. Venezuela*, Feb. 13, 1903, Ralston, 580.

⁴ *Brain (Gt. Brit.) v. U. S.*, Feb. 8, 1871, Hale's Rep. 61, Moore's Arb. 3278; *Sherman, ibid.* 3278 (in this case there seems to have been no connection between the injury and the death, but in both cases claimant left a widow and minor children). On final hearing on the merits, the claim of Mrs. Sherman was disallowed. In *McHugh, ibid.* 3279, where claimant died unmarried without heirs, the U. S. demurrer was sustained and the claim disallowed. See Frazer's dissenting opinion, Hale's Rep. 240, Moore's Arb. 3279.

⁵ *Heirs of Cyrus Donougho (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3012; *Di Caro (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 769; *Cesarino (Italy) v. Venezuela, ibid.* 770.

⁶ *Plumer, Adm. (U. S.), v. Mexico*, March 3, 1849, Opin. 182 (not in Moore).

EXECUTORS AND ADMINISTRATORS

§ 287. Rules Governing Right of Representation.

Persons acting in a representative capacity as executors or administrators are admitted as proper parties to invoke diplomatic protection on behalf of the estate of a decedent, provided they produce valid proof of their legal representative character, *i. e.*, an exemplified copy of the will or letters of administration, and proof of their own identity and that of the decedent.

The right of consuls to act on behalf of deceased nationals is usually provided for in treaties or by the municipal law of the place where the person died or the property is situated.¹ Upon the death of a foreigner without known or resident heirs or next of kin, a public administrator is often appointed to act for the estate.

International commissions usually provide in the rules governing their procedure how and by whom the claims of deceased persons shall be presented. In the statutes establishing domestic commissions, similar provisions are generally found. These requirements are strictly enforced, and not a few claims have been dismissed because the proper person had not appeared as claimant.

In the case of injuries to the person or property of the deceased which may be deemed debts due to his estate, the personal representative, usually the executor or administrator, and not the heir, has been regarded as the proper party claimant.² The reason for this rule was stated by the domestic commission under the Act of March 3, 1849, as follows:

"The board has not the means of deciding questions touching the distribution of intestate estates, which depend upon local laws and involve inquiries as to domicile and many other topics of which we are furnished with no evidence. Besides, it may happen that the rights of creditors

¹ *Supra*, § 166.

² *Robinson (U. S.) v. Mexico*, Act of March 3, 1849, Moore's Arb. 2389 (son of the deceased not proper party claimant, unless proof presented that son is executor or administrator); *Plumer, Adm. (U. S.), v. Mexico*, Opin. 182 (not in Moore); *Baynum (U. S.) v. Mexico*, March 3, 1849, Moore's Arb. 1271; *Wiltz (U. S.) v. Venezuela*, Dec. 5, 1885, *ibid.* 2243; *Thompson v. U. S.*, 20 Ct. Cl. 276 (Japanese Indemnity Fund Act of 1883).

are involved, who are entitled to be paid before any distribution can be made.”¹

The administrator or executor must prove his legal right to appear in his representative capacity, by the production of a probated will or letters of administration, as the case may be. A widow, prosecuting the claim of a deceased husband, was on this ground, denied standing before a commission.² Similarly, a “voluntary,” but not a legal representative, was denied the right to recover.³

§ 288. Citizenship of Original Claimant Governs Jurisdiction.

It has been observed⁴ that the commission will look behind the administrator or person acting in a representative capacity to determine the nationality of the real claimant or beneficiary,⁵ although in some cases the investigation was limited to the citizenship of the person upon whom the injury was originally inflicted.⁶ Indeed, it has been expressly held that the nationality of the administrator was without effect upon the question.⁷ This indifference as to nationality does not apparently extend to an executor.⁸

§ 289. Who May Act as Legal Representative.

The question as to who may properly represent a claimant, during life and after death, has occasionally come before commissions for determination. The representative must always show actual or presumptive authority from a living person he represents.⁹ A municipal

¹ Baynum (U. S.) v. Mexico, March 3, 1849, Moore's Arb. 1271.

² Underhill (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 45, 48. On her subsequently taking out letters of administration, the commission decided that under their rules of procedure, the case had been already closed.

³ Driggs (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 2261.

⁴ *Supra*, p. 629.

⁵ Alvarez (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 1353; Wiltz (U. S.) v. Venezuela, Dec. 5, 1885, *ibid.* 2246.

⁶ Willet (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 2254; Peek (U. S.) v. Venezuela, *ibid.* 2257.

⁷ Halley, Adm., and Ferris, Adm., No. 205 and No. 214 (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 2242; Wiltz, Adm. (U. S.), v. Venezuela, Dec. 5, 1885, *ibid.* 2246.

⁸ Watson, executor of Meiggs (U. S.), v. Chile, Aug. 7, 1892, Moore's Arb. 2259. But the commission permitted an amendment of the memorial to show the citizenship of the heirs, of which permission no advantage appears to have been taken.

⁹ See instances before second court of Alabama claims, Moore's Arb. 4681, 4683.

corporation has been held not to be the representative of its citizens who might claim for themselves.¹ The second *Alabama* Claims court held that a judgment could not be rendered in favor of a guardian.² On the other hand, the owners of a ship were regarded as "the natural representatives of the master and seamen."³ It has also been held that a party may when absent from the state of residence, file his memorial by his attorney in fact.⁴ It has been observed⁵ that surviving partners, in accordance with the common law rule, have been permitted to prosecute partnership claims, although in one case where the surviving partner was an alien, his deceased citizen partner's interest was held to pass to the latter's personal representative. The administrator of a surviving partner has been allowed in appropriate cases to be substituted for the original claimant.⁶

Under the Abandoned or Captured Property Act, by which proof of loyalty was a necessary condition of recovery, it was held that after the grant of letters of administration, when the seizure occurred, the administratrix, having title, could recover on proof of her loyalty, regardless of the disloyalty of her intestate,⁷ but that where the property was seized during the lifetime of the intestate, the latter's loyalty had to be proved.⁸

The second Court of *Alabama* Claims decided that where an administrator was appointed abroad, ancillary administration had to be taken out in the District of Columbia, as a condition for maintaining a claim.⁹

Under the French Spoliation Act of January 20, 1885, the Court

¹ *Reynosa (Mexico) v. U. S.*, July 4, 1868, Moore's Arb. 1356.

² *Ibid.* 4681.

³ *Emily Banning (U. S.) v. Mexico*, July 4, 1868, *ibid.* 1356.

⁴ *Dusenberg (U. S.) v. Mexico*, *ibid.* 2157.

⁵ *Supra*, § 276.

⁶ *Coleman (Gt. Brit.) v. U. S.*, May 8, 1871, Hale's Rep. 98.

⁷ *Carroll v. U. S.*, 13 Wall. 151. See also *Newman v. U. S.*, 21 Ct. Cl. 205, in which the administrator in possession, and not the widow or next of kin had to prove loyalty.

⁸ *Meldrim and Doyle v. U. S.*, 7 Ct. Cl. 597; *Deeson v. U. S.*, 5 Ct. Cl. 526. So the disloyal administrator of a loyal intestate recovered award in *Wilson v. U. S.*, 4 Ct. Cl. 559, 13 Wall. 128; *ibid.* in cases of disloyal executor, *Taylor v. U. S.*, 5 Ct. Cl. 701.

⁹ Moore's Arb. 4681; see also *Manning v. Leighton*, 26 Atl. 258.

of Claims, besides the validity and amount of the claim, determined its "present ownership," which was regarded as lodged in the personal representative who might maintain a suit at law if the claim were an ordinary chose in action; *i. e.*, in the administrator of the original sufferer or of the latter's assignee. By the Act of March 3, 1891 (26 Stat. L. 862, 908), making appropriations for the payment of awards, Congress provided that where the original sufferers were adjudged bankrupts, the award shall be made on behalf of the next of kin instead of assignees in bankruptcy.¹ In the case of individual claimants, the Court of Claims had to certify to the Secretary of the Treasury that the personal representative on whose behalf the award was made represented the next of kin, of which fact, and of the giving of adequate security, the Court had to be satisfied. The Court construed this as general legislation, and held thereafter that only the administrator who represents the next of kin of the original sufferer was the party entitled to relief.² The record of a probate court granting administration was not deemed sufficient evidence of his representing the next of kin, which was required to be supplemented by depositions.³

A recent bill introduced in Congress provides that no claim against the United States shall be paid to a public administrator, unless he was "appointed upon the petition of heirs at law and next of kin of the deceased, or a *bona fide* creditor of the estate."⁴

ASSIGNEES

§ 290. Assignability of Claims.

The assignability of claims is fully recognized by practically all systems of municipal law and by international law. In Anglo-American law the test in determining the assignability of a chose in action is whether or not it would survive and pass to the personal representative of a decedent. If it would so survive, it may be assigned so as

¹ *Brig Hannah*, Van Uxen, Adm., *v. U. S.*, 27 Ct. Cl. 328.

² *Ship Concord*, 27 Ct. Cl. 142; *Ship Theresa*, 28 Ct. Cl. 326 (*dictum*). See also *Blagge v. Balch*, 162 U. S. 439.

³ *Eldridge*, Adm., *v. U. S.*, 26 Ct. Cl. 253. See also *Ship Eliza*, 28 Ct. Cl. 480, and *Ship Juliana*, 35 Ct. Cl. 400.

⁴ S. 3180, 63rd Cong., 1st sess., Oct. 2, 1913, by Senator Hughes.

to pass an interest to the assignee which he can in most jurisdictions enforce in his own name; if it does not so survive, it is not assignable.¹ The common-law rule as to the non-assignability of choses in action, first modified by courts of equity, has been practically abandoned, and rights of action arising out of contract or out of torts which are injuries to property, are now generally recognized as assignable. So in international law claims arising out of concession contracts² or arising from the tortious taking of property³ may be assigned, so as to vest the legal title in the assignee.

Under the general rule that a claim must be national in origin in order to obtain diplomatic cognizance, the Department of State has on many occasions declined its protection to the American assignee of a claim which originally belonged to an alien. In other words, the right of interposition is not assignable.⁴ When, however, a foreign concession, after its valid assignment to an American citizen, is violated by a foreign government, the injury is considered American in its origin and properly the subject of American protection.

§ 291. Assignor and Assignee Must Have Same Citizenship.

The validity of an assignment being recognized, the transfer of a claim from an assignor of one nationality to an assignee of another has often been regarded by international tribunals as fatal to the claim. Thus, an assignor, a citizen of the claimant country, was in several cases held to have denationalized his claim and to have lost his standing before an international commission by reason of having transferred it to the national of another country.⁵ By the assignment,

¹ 2 Am. and Eng. Encyc. of Law, 1017, citing *Pomery on Remedies and remedial rights*, §§ 146-147. See also *Comegys v. Vasse*, 1 Pet. 193.

² *Orinoco Steamship Co. (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 73 (although the question of notice to the government affected the matter); *McMurdo (U. S.) v. Portugal*, June 13, 1891, Moore's Arb. 1865 *et seq.*, For. Rel., 1900, 1903.

³ *Camy (France) v. U. S.*, Jan. 15, 1880, Moore's Arb. 2398, Boutwell's Rep. 105; *Lasarte (Peru) v. U. S.*, Jan. 12, 1863, Moore's Arb. 2390, 2394. Decisions of British-American Claims Commission of 1871, Ralston, International arbitral law, 103 (wrongful seizures in prize cases); Decisions of the first and second Court of *Alabama Claims*, Moore's Arb. 4654 and 4679, 4682; *Judson v. Corcoran*, 17 How. 612; *Lewis v. Bell*, 17 How. 616.

⁴ Moore's Dig. VI, § 982.

⁵ *Laffitte (U. S.) v. France*, July 4, 1831, Kane's Notes; *Jarrero (U. S.) v. Mexico*,

the claim ceases to be the claim of the originating state. The assignor having lost the legal title to the claim and the assignee not having the necessary jurisdictional nationality are both disqualified as claimants. On the other hand, the claims of assignees, who by nationality were within the jurisdiction of the commission, have been disallowed when the assignor was of another nationality.¹ Jurisdictional citizenship of both assignor and assignee is necessary. The conclusion may therefore be drawn that while claims can be denationalized by their assignment to aliens,² they cannot be nationalized by their assignment from their original alien owners to citizens. Even where they are original American claims, but are assigned to aliens and then reassigned to Americans, it seems that the United States will ordinarily decline to extend its protection.³ These conclusions are merely phases of the general principles that a claim must be national in origin as well as at the time of presentation and that a claim must be continuously owned by a citizen.⁴ The assignment of a claim, therefore, from one citizen to another of the same country will not affect its national character.⁵ In this case, only the private and not the public interest passes.⁶

§ 292. Special Provisions of Federal Statutes in Certain Cases.

While the right to indemnity for an unjust capture has been held to attach to the ownership of the property captured and to be assignable. Mar. 3, 1849, Moore's Arb. 2324; *Camy (France) v. U. S.*, Jan. 15, 1880, Moore's Arb. 2398 (in which case an ingenious argument to the effect that the U. S. Act of 1853 prohibiting assignments of claims against the U. S. made the transfer invalid, and therefore left the title in the assignor, was considered unsound); *Benson (U. S.) v. Peru*, Jan. 12, 1863, *ibid.* 2390 (assignment by an American citizen to a Peruvian); *Coleman (Gt. Brit.) v. U. S.*, May 8, 1871, Hale's Rep. 98 (assignment by British subjects to American assignee a ground of disallowance); *Gerson (U. S.) v. Mexico*, July 4, 1868, No. 531, Opin. II, 565-569.

¹ *Slocum (U. S.) v. Mexico*, March 3, 1849, Moore's Arb. 2386. See also *Dimond (U. S.) v. Mexico*, *ibid.* 2388 (*dictum*); *Barnes (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 1353; *Lasarte (Peru) v. U. S.*, Jan. 12, 1863, *ibid.* 2390, 2394.

² The one class of claims which cannot be extinguished by assignment are those where there is a direct affront or injury to the state, *e. g.*, the Lienchou Riot Cases, For. Rel., 1904.

³ *Candelaria Gold and Silver Mining Co. claim*, 1912.

⁴ *Infra*, § 306 *et seq.*

⁵ *Comegys v. Vasse*, 1 Pet. 193.

⁶ *Judson v. Corcoran*, 17 How. 612.

able,¹ a somewhat different view was taken by Congress in the French Spoliation Act of 1885² and in the Act of March 3, 1891, making appropriations to pay awards thereunder. In the belief that many of these claims had passed out of the families of the original sufferers from the spoliations and into the hands of speculators who had purchased them at a great discount and had then pressed for payment of the full amount of the original losses, Congress authorized the court to determine whether the claims belonged to assignees, the date of the assignment and the consideration paid therefor, and in the Act of 1891 even provided that awards should be made on behalf of next of kin instead of to assignees in bankruptcy.³ Few claims were presented by assignees. The Act of March 3, 1899⁴ provided that no French Spoliation claim appropriated for was to be paid "if held by assignment or owned by an insurance company." Where the assignment had been made for a good consideration prior to 1800, the date of the assumption of liability by the United States, it was held that the assignee, who then owned the claim, was the one on whose behalf the government asserted the claim against France, and the one entitled to an award under the Act.⁵

In 1853, Congress provided, in an Act to prevent frauds upon the Treasury,

"that all transfers and assignments hereafter made of any claim upon the United States, or any part or share thereof, . . . shall be absolutely null and void, unless the same shall be freely made and executed . . . after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." ⁶

¹ *Comegys v. Vasse*, 1 Pet. 193.

² 23 Stat. L. 282. A similar prohibition of payment to assignees was embodied by Congress in the Act appropriating funds to remunerate the officers and crew of the U. S. S. *Wyoming* for valuable services in destroying hostile vessels in Japan. Act of Feb. 22, 1883, 22 Stat. L. 422.

³ Provision repeated in subsequent appropriation acts in payment of French Spoliation Claims. Memorandum printed for Committee on War Claims, 62nd Cong., 2nd sess. (Washington, 1912), p. 54.

⁴ 30 Stat. L. 1205.

⁵ *Brig Betsey*, Daniel Boyer, Master, H. Doc. 369, 60th Cong., 1st sess., Report of findings of the Court of Claims, to accompany H. R. 19115 (1912), p. 71.

⁶ Act of Feb. 26, 1853, 10 Stat. L. 170, now R. S., § 3477. The history of the Act

While the Act was at first broadly construed to prevent all assignees from bringing suits against the United States,¹ its application has since been held to cover cases of voluntary assignment only, and not to extend to cases where title is transferred by operation of law, *e. g.*, where the assignee is an executor, administrator, or an assignee in bankruptcy, or for the benefit of creditors.² It has been held that when the assignment is void under the Act of 1853, it may before actual payment be repudiated by the assignor, who may then sue in his own name. The Act of March 3, 1887, which enlarged the jurisdiction of the Court of Claims by providing a right to sue the United States on claims in respect of which "the party would be entitled to redress against the United States . . . if the United States were suable," was held to give an assignor the right to sue the Government in his own name.³

The court of commissioners of *Alabama* claims held that any assignment made after the Act of 1882, reëstablishing the court, was void,⁴ but implied that one made prior to the Act of 1882 was not within the inhibitions of the Act of 1853, prohibiting assignments.⁵ An international claim of a citizen of France against the United States was in the *Camy* case held as not subject to the prohibition against assignment contained in the Act of 1853.⁶

It need hardly be emphasized that any defect in the claim or in

and of its interpretation by courts and accounting officers is discussed by E. I. Renick in an article "Assignment of government claims," 24 *American Law Rev.* (1890), 442-456; 876-877.

¹ *U. S. v. Gillis*, 95 U. S. 407; *Cote v. U. S.*, 3 Ct. Cl. 64. But see *Lawrence v. U. S.*, 8 Ct. Cl. 252.

² *Erwin v. U. S.*, 97 U. S. 393, 397; *Goodman v. Niblack*, 102 U. S. 556 (*dictum*); *Butler v. Goreley* (1892), 146 U. S. 303, 312; *Redfield v. U. S.*, 27 Ct. Cl. 393. It has no application to the equitable doctrine of subrogation. *U. S. v. American Tobacco Co.*, 166 U. S. 468.

³ *Emmons v. U. S.*, 48 Fed. 43. See also *U. S. v. Jones*, 131 U. S. 1.

⁴ *Stevens v. U. S.*, No. 265, class 2, *Moore's Arb.* 4680. See also *Manning v. Leighton*, 26 Atl. 258, 260 and cases cited. See also *Howes v. U. S.*, 24 Ct. Cl. 170.

⁵ See Mr. Moore's account in *Moore's Arb.* 4680.

⁶ *Camy (France) v. U. S.*, Jan. 15, 1880, *Moore's Arb.* 2398; *Boutwell's Rep.* 105. The Act of 1853 was also considered inapplicable to a claim against the Chinese indemnity fund. *Hubbell v. U. S.*, 15 Ct. Cl. 546.

the original claimant cannot be purged by the transfer of the claim to an assignee or successor personally in good standing.¹

§ 293. Assignees in Bankruptcy.

Assignees in bankruptcy are regarded as purchasers for value, having the legal title to a claim and the right to sue thereon in their own name to the exclusion of the assignor debtor.² In the *Ruty* case³ before the French-American commission of 1880, the effect of the local law of the United States was recognized as permitting the passage of an international claim from the claimants to the assignees in bankruptcy. In the *Christern* case, before the German-Venezuelan commission of 1903, it was held that the nationality of the assignee in bankruptcy, and not that of the insolvent debtors, governed the jurisdiction of the commission.⁴

The court of commissioners of *Alabama* claims held that claims of the first or the second class and particularly war-premium and exculpated cruiser claims passed to the assignee by an assignment in bankruptcy or insolvency or by a general assignment for the benefit of creditors.⁵ The Court of Claims, under the Abandoned or Captured Property Act, has held that an assignment passed legal title to the assignee in bankruptcy,⁶ who may sue on the claim in his own name.⁷ Under the provisions of the Act of 1891, making appropriations for French Spoliation awards,⁸ it has already been observed that in cases where the original sufferers were adjudicated bankrupts, awards were

¹ *Robinson (U. S.) v. Mexico*, Act of March 3, 1849, Moore's Arb. 2389; *Dimond (U. S.) v. Mexico*, *ibid.* 2386; *Young (U. S.) v. Mexico*, *ibid.* 2753.

² *Christern and Co. (Germany) v. Venezuela*, Feb. 13, 1903, Ralston, 597, 598; *Parrott (U. S.) v. Mexico*, March 3, 1849, Moore's Arb. 3009-3011 (assignor held divested of all title).

³ *Ruty (France) v. U. S.*, Jan. 15, 1880, Boutwell's Rep. 108; Moore's Arb. 2401.

⁴ Ralston, 597. One of the insolvent debtors was a Dane, but as the assignee in bankruptcy was a German, the commission took jurisdiction. Inasmuch as the protocol did not give jurisdiction over claims "owned" by Germans, the award is open to question as in conflict with the rule that claims must be national in origin and continuously national in ownership.

⁵ Moore's Arb. 4679, 4682. See cases in municipal courts cited in note 2, p. 4679.

⁶ *Erwin v. U. S.*, 13 Ct. Cl. 49, 97 U. S. 392.

⁷ *Burke v. U. S.*, 13 Ct. Cl. 231; *Person v. U. S.*, 8 Ct. Cl. 543. Probably the assignee could also sue in the name of his assignor, as in *Morgan v. U. S.*, 14 Ct. Cl. 319.

⁸ 26 Stat. L. 908.

to be made "on behalf of the next of kin instead of to assignees in bankruptcy."¹ It has also been noted that the inhibitions of the Act of 1853 against the assignment of claims against the United States does not apply to assignees in bankruptcy or insolvency.² As between the bankrupt and the assignee in bankruptcy, the protocol, the rules of the commission, or the statute creating the commission usually provide who shall verify the petition.

§ 294. Receivers.

Receivers and liquidators of bankrupts have in international law practically the same legal position as assignees. Citizenship of the bankrupt and of the receiver or liquidator has been held a jurisdictional prerequisite by international tribunals.³ Disqualifications of the bankrupt, *e. g.*, unneutral conduct, disloyalty or any other impairment of his right to claim, affect equally the right of the receiver.⁴ His right, as legal successor, to prosecute the claims of the bankrupt is fully admitted.⁵ He cannot, however, prosecute the international claims of individual creditors of the bankrupt, for after the receiver has been appointed, no individual credit of the total estate is the property of any one creditor. The receiver merely acts as administrator of the property of the bankrupt.⁶

BENEFICIAL OR EQUITABLE OWNERS

§ 295. Equitable American Interest Protected.

That the Department of State in its diplomatic support of claims

¹ *Supra*, p. 639. To the effect that next of kin may prosecute claim, if assignees fail to do so, see *Ship Jane*, *Buchanan v. U. S.*, 24 Ct. Cl. 74.

² *Supra*, p. 640.

³ *Chauncey (U. S.) v. Chile*, May 24, 1897, No. 4, Report, 1901, p. 22; *Brewer, Moller and Co. (Germany) v. Venezuela*, Feb. 13, 1903, Ralston, 597; *Baasch and Römer (Netherlands) v. Venezuela*, Feb. 28, 1903, *ibid.* 906. But see *Christern (Germany) v. Venezuela*, Feb. 13, 1903, *ibid.* 598, where the liquidator's citizenship alone was held to govern.

⁴ See, *e. v.*, *Accessory Transit Co. (U. S.) v. Costa Rica*, July 2, 1860, Moore's Arb. 1558, 1560.

⁵ For a contrary decision of the Court of Claims, see *Howes v. U. S.*, 24 Ct. Cl. 170; *cf.*, however, *Redfield v. U. S.*, 27 Ct. Cl. 393, and *Borcherling v. U. S.*, 35 Ct. Cl. 311, 185 U. S. 223.

⁶ *Bance (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 172; *Morris' Rep.* 383. See also *The Alsop Claims (U. S.) v. Peru*, Jan. 12, 1863, Moore's Arb. 1627.

looks to the citizenship of the real or equitable owner of the claim as distinguished from the nominal or ostensible owner appears from the sections on corporations, administrators and assignees. It is not possible to posit any definite rule, but it may be said that the equitable American interest in property abroad, whether on the part of creditors, mortgagees, stockholders or other persons with special or derivative rights, has often led the Department, in the exercise of its discretion, to use good offices for their protection, although the record title may have been vested in an alien. In the case of vessels flying a foreign flag, however, the strict rule is applied that the state of the flag is presumed to undertake the international protection of the vessel.

In the United States-Venezuelan commission of 1903, Umpire Barge held that the beneficial owner actually "owned" the claim and properly appeared as the claimant.¹

The Court of Claims in its awards under the Abandoned or Captured Property Act² and under the French Spoliation Act³ held that the record title was not conclusive, but that the equitable owner could establish his equitable ownership before the court.

§ 296. Creditors.

Those having a beneficial interest in a claim are frequently creditors, and the Department of State in the prosecution of claims takes account of the equitable interests of American creditors.

As a jurisdictional matter, the decisions of arbitral commissions have in some cases been against and in others in favor of the right of American creditors of an alien to claim as the real sufferers from violations of the property rights of their alien debtors. The Spanish-American commission under the treaty of 1871 held in several cases that injuries upon the property of a Spanish subject gave his American

¹ *Henry (U. S.) v. Venezuela*, Feb. 17, 1903, *Ralston*, 14, 23. See also *Alvarez (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 1353, to the effect that the person who had the "right to the award" must be considered the "real claimant," and must be a citizen. See also *Wiltz, Adm. (France), v. U. S.*, Jan. 15, 1880, *ibid.* 2246, and *Texas Star v. U. S.*, Act of June 23, 1874, *ibid.* 2360, 2366.

² *Hall v. U. S.*, 11 Ct. Cl. 704; *Cones v. U. S.*, 8 Ct. Cl. 421.

³ *Van Wagenen v. U. S.*, 25 Ct. Cl. 110.

creditors no right to appear before the commission as claimants.¹ It may well be that the American injury was considered too remote. In the Bance case before the American-Venezuelan commission of 1903, the American creditors of a bankrupt Venezuelan were not recognized as individual claimants when a receiver in bankruptcy representing all the creditors had been appointed.²

On the other hand, American intervenors in a claim, basing their right to a share in the award upon their position as creditors of the original claimant in the transaction out of which the claim arose, were protected as to their proportionate interest by the umpire of the American-Venezuelan commission in the Turini case, the original claimant having died and his administratrix appearing as the claimant of record.³ The repeated expressions of arbitral commissions, in cases where the original claimant had died, to the effect that the administrator and not the heir should appear as the party claimant, is often founded on the express ground that creditor beneficiaries of an award should be protected.⁴ In some cases, it has been expressly stated that the beneficiaries of an award, be they heirs or creditors, must prove their citizenship.⁵ It is evident that creditors' interests, where possible, have usually been protected.

Under the Indian Depredation Act of 1891, assignees and creditors of the claimant were held to have no rights.⁶ The intent of the French

¹ Mora and Arango (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. 2336; Benner, *ibid.* 2335; Rodriguez, *ibid.* 2336.

² Bance (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 172.

³ Turini (U. S.) v. Venezuela, *ibid.* 51, 62. In the Alsop claim against Chile, Dec. 1, 1909, Award July 5, 1911, it seems that American and even Chilean creditors were permitted to share in the award, the award being made without inquiry into the nationality of the ultimate recipients.

⁴ Wiltz, Adm. (France), v. U. S., Jan. 15, 1880, Moore's Arb. 2244, 2248; Baynum (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 1271; *supra*, p. 633.

⁵ Wulff (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 1354; Wiltz (France) v. U. S., Jan. 15, 1880, *ibid.* 2246. See also Kane's notes on . . . questions decided by . . . Commissioners under convention with France, July 4, 1831, Phila., 1836, p. 21. It seems that while equitable owners had to prove their citizenship, assignees for the benefit of creditors were excused from proving the citizenship of the creditors.

⁶ Labadie v. U. S., 32 Ct. Cl. 368. But see McKenzie v. U. S., 34 Ct. Cl. 278, 285, and dissenting opinion of Nott, J., 287.

Spoliation Acts was to benefit the next of kin of the original sufferers, and to exclude creditors, legatees and assignees.¹

§ 297. Mortgagees.

Mortgagees are secured creditors in a special sense. A mortgage is in form a conveyance, vesting in the mortgagee upon its execution a conditional estate, which becomes absolute upon breach of the condition.² The Department of State in the exercise of its discretion has on several occasions exercised good offices on behalf of the equitable interest of American mortgagees of foreign-owned property. This has been particularly true of American bondholder-mortgagees of foreign railroads.

International commissions by weight of authority have shown a disinclination to allow American mortgagees to appear as claimants for damages arising out of injuries to the property of their debtor mortgagors. This conclusion may be defended on the ground that the mortgagee is too indirectly affected by such injury to authorize his appearance as a claimant. In the case of Rodriguez before the Spanish-American Claims Commission of 1871, the embargo of an estate which was mortgaged to the claimant, an American citizen, but of which he had neither the legal title nor possession, was held to afford no ground for a claim of damages.³ A similar result was reached by the British-American commission of 1871, on the claim of a British mortgagee of property destroyed by the United States army.⁴ On the other hand, this same commission allowed the claim of the mortgagee of a British vessel wrongfully captured by a United States cruiser during the Civil War, and subsequently condemned and sold.⁵

¹ *Blagge v. Balch*, 162 U. S. 439, 31 Ct. Cl. 460; *Van Wagenen, Adm., v. U. S.*, 31 Ct. Cl. 175, in which, however, it was said, as *dictum*, that under certain possible conditions, creditors, as beneficiaries under a deed of trust, may have a claim upon the recovery.

² *Hutchins v. King*, 1 Wall. 53, 57.

³ *Rodriguez (U. S.) v. Spain*, Feb. 12, 1871, *Moore's Arb.* 2336.

⁴ *Bain (Gt. Brit.) v. U. S.*, No. 231, May 8, 1871, MSS. inserted in briefs of Spanish Treaty Claims Com. VI, 243-247.

⁵ *H. J. Barker, mortgagee, No. 432, and Overend, Gurney and Co., mortgagees, No. 433 (Gt. Brit.) v. U. S.*, May 8, 1871, *Hale's Rep.* 141-148. See also the *Texas Star v. U. S.*, Act of June 23, 1874, *Moore's Arb.* 2360, 2366.

In the Heny case,¹ it has been noted that the equitable owner of injured property was considered the real claimant, and, as will presently be observed, insurers of unlawfully condemned vessels and cargoes have often received awards from international commissions.

Numerous claims were brought before the recent Spanish Treaty Claims Commission arising out of damages for injuries done to the property of a Spanish subject on which the claimant, an American citizen, held a mortgage or lien of some kind. Claimants contended that this injury to the equitable interest of an American citizen made Spain liable, whereas the Government contended that the release by Spain of the liability of the United States to the mortgagor also released any claim of mortgagees, upon whom the release is conclusive and binding, and moreover that the mortgagee's loss is too indirect to give him a standing before the commission. The Commission does not appear to have definitely disposed of this question, although claims of mortgagees were apparently all disallowed on the merits.²

§ 298. Insurers.

The question of the right of insurers to appear as claimants has on many occasions been presented for determination to the Department of State and to special and general claims commissions. Its relation to the question of citizenship either on the part of insured or insurer has served to make it an exceedingly complicated matter, and, as will be seen, the decisions of arbitral commissions afford little aid in arriving at definite rules.

The object of the contract of insurance is admitted to be indemnity to the insured, the consideration to the insurer being the premium received and his hope of recovery, should a loss occur, his *spes recuperandi*. When the insurance money is paid by the insurer, whether the loss has been total or partial, and whether or not there has been abandonment, the insurer so far stands in the place of the assured that he is entitled to recover whatever compensation for the loss the assured may be able to recover from any third party.³ The insurer

¹ *Supra*, p. 643.

² Special Rep. of William E. Fuller, 1907, p. 31; Brief of the Government, October 1, 1903, Briefs VI, 165-242; Claimant's briefs, *ibid.* VI, 1-164.

³ These general principles of insurance law are supported by the authorities and

is subrogated to the rights of the insured, which relate back to the time of the loss.

This view of the legal position of insurers has not always received support from tribunals acting under international treaties. Adhering to the general rule, the commissioners under the treaty of July 4, 1831 with France permitted insurers to claim the amounts they had paid, without regard to the question whether the loss was total or partial, and their right to claim, by analogy to the case of abandonment, was held to attach from the moment when the loss occurred, *i. e.*, when their liability ceased to be contingent. The commissioners under the Florida treaty of 1819, however, regarded insurers as assignees, and recognized them as claimants only when they were entitled to a cession from the assured, *i. e.*, only when they had paid for a total loss.¹

§ 299. American Insurers of Foreign Property.

One of the first problems which the international position of insurers presents, is whether the American insurer of foreign property destroyed or injured under circumstances rendering a foreign government liable for the loss is entitled, after paying the insurance, to the protection of the United States in prosecuting an international claim. The question has usually arisen in cases of marine insurance. Where there has been abandonment and payment as for a total loss, there seems little doubt that the insurer is the person directly to suffer by the international wrong, and it is a logical rule that the right of indemnity is vested in the party who has been substantially injured by the act of the foreign government.

The Department of State has on several occasions taken this view

by the Supreme Court. Phillips, W., A treatise on the law of insurance, 5th ed., Boston, 1895, §§ 1722-1723; *Hall v. Railroad*, 13 Wall. 367; *Holbrook, Adm., v. U. S.*, 21 Ct. Cl. 434, 437.

¹ Kane's notes on some of the questions decided by the commissioners under the convention with France, July 4, 1831, Philadelphia, 1836, pp. 24-25. See also *Gracie v. N. Y. Insurance Co.*, 8 Johns. 237, 245. That an assignment or cession is unnecessary to transfer the insured's rights to the insurer was held in *Comegys v. Vasse*, 1 Pet. 193. See authorities reviewed in *Holbrook v. U. S.*, 21 Ct. Cl. 434, 437 *et seq.*; *Mechanic (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3212.

and made representations to foreign governments on behalf of American insurers of foreign-owned property. Courts sitting as international commissions have been far from unanimous, however, in deciding this question. The commissioners under the Florida treaty decided that they would not receive the claims of American underwriters who had insured the property of foreigners, which had been illegally taken by France or Spain.¹ A somewhat similar view, under which the right of insurers was held to be governed by the international rights of the insured, was taken by the Court of Claims in several French Spoliation cases. Where the property captured by the French was British and legally subject to condemnation as enemy property, no right against France could pass to an American insurer, for it was held that insurers could have no higher standing in court than the owners whom they insured.²

On the other hand, the nationality of the insurers alone, regardless of that of the insured was in several cases held to govern the jurisdiction of the tribunal. For example, in the claim of the *Circassian* before the British-American commission of 1871, which had jurisdiction of claims "growing out of injuries to the person and property of British subjects," the claim of British insurers of French confiscated cargo was allowed.³ Standing was also accorded by Commissioner Little of the Venezuelan-American commission of 1885 to the American insurers of Mexican property, which was alleged to have been illegally condemned by Venezuela.⁴

¹ Moore's Arb. 4516.

² Brig *William*, *Haskins v. U. S.*, 23 Ct. Cl. 201; Schooner *Vandeput v. U. S.*, 37 Ct. Cl. 396. This is probably good law as to the insurer's substantive rights. On the question of jurisdictional citizenship, a contrary view has been taken. See note 4.

³ The *Circassian* (Gt. Brit.) *v. U. S.*, May 8, 1871, Moore's Arb. 3911, 3920, Hale's Rep. 141, 147. See also claim of *Caroline*, a wrongfully condemned Peruvian bark insured by American underwriters (*U. S. v. Brazil*, Moore's Dig. VI, 748, Moore's Arb. 1342).

⁴ *Mechanic* (U. S.) *v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3210, 3212. (The claim was disallowed on the merits.) See also *Mechanic* (U. S.) *v. Ecuador*, Nov. 25, 1862, *ibid.* 3221, in which Hassaurek made an award on the merits. See also the case of the ship *Catherine*, No. 513 (American insurer of illegally condemned British property), against France, in which claim was allowed, cited in Brig *William*, 23 Ct. Cl. 201, 206.

§ 300. Foreign Insurers of American Property.

Foreign insurers of American property have occasionally received the indirect protection of the United States through the claim made on behalf of the owners of the property. It is open to question, however, whether in the absence of a special treaty, they would be permitted directly to share in the distribution of any indemnity which might be received from the foreign government. Under their legal rights as insurers, they would, of course, have a right of action against the insured for any loss which they had paid, and for which the insured was indemnified by a foreign government. Under these circumstances, and considering that the flag of a vessel usually protects the cargo as well, it might conceivably happen that foreign insurers of foreign-owned cargo on an American vessel might indirectly share in the distribution of an international indemnity. The second court of commissioners of *Alabama* claims, under an Act giving standing to those who were entitled to the "protection of the United States in the premises," held that a British insurance company doing business exclusively in Great Britain could not appear as a claimant to the fund.¹

Insurers have in most cases been given an independent standing before international commissions, based upon their own nationality, without having to prove the nationality of the assured.² The insurers, therefore, have generally claimed in their own names.³ In the claim of Gerard before the British-American commission of 1871, a contention that the contract of insurance covered an illegal object was apparently not given consideration.⁴

Inasmuch as no written opinion was handed down, no explanation can be given for the disallowance by the Swedish-Venezuelan commis-

¹ Bischoff *et al.* v. U. S., No. 5693, class 1, Moore's Arb. 4672. Foreign insurers were excluded by their alienage from any participation in the fund under the treaty of 1831 with France, Moore's Arb. 4481.

² The important exception made to this rule by the commissioners under the Florida treaty, who required proof of American citizenship by insured and insurer, has already been noted. Moore's Arb. 4516; *supra*, p. 648.

³ Hubbell v. U. S., 15 Ct. Cl. 546 (underwriters who had paid losses sustained by reason of the capture and plunder of a vessel and cargo by Chinese pirates participated in the Chinese indemnity fund); Holbrook, Adm., v. U. S., 21 Ct. Cl. 434, 442; *The Sir William Peel*, Gerard (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3935, 3948; *The Mechanic* (U. S.) v. Venezuela, Dec. 5, 1885, *ibid.* 3210, 3212.

⁴ Moore's Arb. 3935, 3946, 3948.

sion of 1903 of the claim of the Ydun Life Insurance Co., arising out of a policy paid to the widow of Captain Meling, who had been killed by an act of Venezuelan authorities, and for whose death the commission had made an award to the widow.¹

§ 301. Provisions of Federal Statutes.

Special provisions as to the rights of insurers have been contained in various statutes permitting suits against the United States arising out of international claims. For example, § 12 of the Act of June 23, 1874, establishing the first court of *Alabama* claims, limited the right of recovery of an insurer to so much of his losses, in respect of his war risks, as "exceeded the sum of . . . his premiums or other gains upon or in respect to such war risks."² The Act of March 3, 1899,³ to the effect "that any French Spoliation claim appropriated for in this act shall not be paid if held by assignment or owned by an insurance company" was held to be a direction to and restriction upon the Secretary of the Treasury.⁴ This restriction has been renewed in the subsequent omnibus claims appropriation acts of 1902 and 1905, but there seems no valid reason why the claims of insurance companies should be excluded from payment in view of the fact that private insurers and underwriters have been paid, that insurance companies received payment under the appropriation act of March 3, 1891, and that insurance companies apparently received indemnities for spoliation under the treaty of 1819 with Spain, under the treaty of 1830 with Denmark, under the treaty of 1831 with France and under the treaty of 1832 with the Two Silicies.⁵

¹ Meling (Sweden) v. Venezuela, March 10, 1903, Ralston, 954.

² Davis' Rep., Sen. Ex. Doc. 21, 44th Cong., 2nd sess. (1877), 22-23, 115-117. The same rule seems to have been applied by the second court under the act of 1882. Moore's Arb. 4678. This same section 12 (18 Stat. L. 247), limited recovery to insurance companies lawfully existing at the time of the loss under the laws of one of the U. S. Nor was a claim admissible, when the injured party or his assignee or representative had received indemnity from an insurer, unless the loss exceeded the insurance.

³ 30 Stat. L. 1205.

⁴ Ship *Juliana*, 35 Ct. Cl. 400. See 23 Op. Atty. Gen. (Griggs), 179.

⁵ S. Ex. Doc. 74, 49th Cong., 1st sess., cited in Hearings before House Committee on Claims on H. R. 22534, 61st Cong., 2nd sess., March 30, 1910, statements of J. Henry Scattergood, pp. 45-46.

PART IV

LIMITATIONS ON DIPLOMATIC PROTECTION

It will now be proper to consider the various classes of facts, acts and considerations which operate as conditions, qualifications and limitations upon the right to diplomatic protection and the prosecution and recovery of international claims. These limitations on protection will be discussed under five broad divisions, namely, those arising (1) out of conditions prescribed by the claimant's own government; (2) out of acts of the party claimant; (3) out of the subject-matter of the claim; (4) out of public policy; and (5) out of the municipal legislation of the defendant government.

CHAPTER I

CONDITIONS PRESCRIBED BY THE CLAIMANT'S OWN GOVERNMENT

§ 302. Obligations of the Person Claiming Protection.

Before a person receives the protection of the United States, the Department of State must be satisfied that the individual is properly entitled to American protection, and has complied with the conditions required for its extension. Within the terms of the protocols and treaties under which they operate, international tribunals apply the same rule.

The first condition of protection is, obviously, proof of *bona fide* citizenship. The substantive elements of citizenship have received consideration in Part III, and attention will therefore be given here to the more formal conditions imposed by the government upon an applicant for protection.

The applicant for a passport, under the rules governing the grant-

ing and issuing of passports of January 12, 1915,¹ must meet various requirements, *e. g.*, he must make a written application, in the form of an affidavit, to the Secretary of State, duly attested, setting forth the date and place of his birth, his occupation, the place of his permanent residence, and within what length of time he will return to the United States for permanent residence. He must take the oath of allegiance, and give a detailed physical description of his person. The applicant's identity must be established by the certificate of a credible witness. Further particulars are required from naturalized citizens and their children claiming citizenship through the parent's naturalization, from persons born in the United States of Chinese parents, or born abroad of native American fathers, from women, and from residents of an insular possession of the United States. A prescribed fee of one dollar must be paid. As already observed,² the applicant for a declarant's passport must show that he has resided in the United States at least three years, that he is not yet eligible for naturalization, that at least six months have elapsed since his declaration of intention, that he has not previously obtained a similar passport, that a special and imperative exigency requires his absence from the United States and that since his declaration of intention he has not applied to any other government for a passport.³

Before a diplomatic claim on behalf of a citizen is presented to any foreign government, the Department of State requires the claimant to make out a *prima facie* case warranting interposition.⁴ In first instance, therefore, the Department, upon receipt of a claim against a foreign government, acts in a quasi-judicial capacity, and it may be said that far more claims are rejected than prosecuted. The Department does not possess the facilities or machinery for a regular judicial inquiry into the merits of a claim, and has therefore prescribed certain rules of procedure for the submission by claimants of memorials invoking the Department's interposition in the prosecution of a claim against a foreign government.

¹ Printed *supra*, § 219.

² *Supra*, p. 501.

³ Rules governing the granting and issuing of passports to those who have declared their intention to become citizens of the United States, November 14, 1913.

⁴ See Moore's Dig. VI, §§ 971-972.

For the information of claimants, the Department, on March 5, 1906, published a circular with which claimants are advised to conform as nearly as possible in the submission of memorials. This circular reads:

§ 303. Instructions for Claimants against Foreign Governments.

"Citizens of the United States having claims against foreign governments, not founded on contract, in the prosecution of which they may desire the assistance of the Department of State, should forward to the Department statements of the same, under oath, accompanied by the proper proof.

The following rules, which are substantially those which have been adopted by commissions organized under conventions between the United States and foreign governments, for the adjustment of claims are published for the information of citizens of the United States having claims against foreign governments of the character indicated in the above notification; and they are advised to conform as nearly as possible to these rules in preparing and forwarding their papers to the Department of State.

Each claimant should file a memorial, *in triplicate*, properly dated, setting forth minutely and particularly the facts and circumstances from which the right to prefer such claim is derived by the claimant. This memorial should be verified by his or her oath or affirmation.

All subsequent communications to the Department in the nature of statements of fact, arguments, or briefs should likewise be furnished *in triplicate*.

The memorial and all the accompanying papers should have a margin of at least one inch on each side of the page, so as to admit of their being bound in volumes for preservation and convenient reference; and the pages should succeed each other, like those of a book, and be readable without inverting them.

When any of the papers mentioned in rule II are known to have been already furnished to the Department by other claimants, it will be unnecessary to repeat them in a subsequent memorial. A particular description, with a reference to the date under which they were previously transmitted, is sufficient.

Nor is it necessary, when it is alleged that several vessels have been captured by the same cruiser, to repeat in each memorial the circumstances in respect to the equipment, arming, manning, flag, etc., of such cruiser, which are relied upon as the evidence of the responsibility of a foreign government for its alleged tortious acts. A simple reference to and adoption of one memorial in which such facts have been fully stated will suffice.

It is proper that the interposition of this Government with the foreign government against which the claim is presented should be re-

quested in express terms, to avoid a possible objection to the jurisdiction of a future commission on the ground of the generality of the claim.

Claims of citizens against the Government of the United States are not generally under the cognizance of this Department. They are usually subjects for the consideration of some other Department, or of the Court of Claims, or for an appeal to Congress.

RULES

In every memorial should be set forth—

1. The amount of the claim; the time when and place where it arose; the kind or kinds and amount of property lost or injured; the facts and circumstances attending the loss or injury out of which the claim arises; the principles and causes which lie at the foundation of the claim.

2. For and in behalf of whom the claim is preferred, giving Christian name and surname of each in full.

3. Whether the claimant is now a citizen of the United States, and, if so, whether he is a native or naturalized citizen and where is now his domicile; and if he claims in his own right, then whether he was a citizen when the claim had its origin and where was then his domicile; and if he claims in the right of another, then whether such other was a citizen when the claim had its origin and where was then and where is now his domicile; and if, in either case, the domicile of the claimant at the time the claim had its origin was in any foreign country, then whether such claimant was then a subject of the government of such country or had taken any oath of allegiance thereto.

4. Whether the entire amount of the claim does now, and did at the time when it had its origin, belong solely and absolutely to the claimant; and if any other person is or has been interested therein, or in any part thereof, then who is such other person and what is or was the nature and extent of his interest; and how, when, and by what means and for what considerations the transfer of rights or interests, if any such was made, took place between the parties.

5. Whether the claimant, or any other who may at any time have been entitled to the amount claimed, or any part thereof, has ever received any, and, if any, what, sum of money or other equivalent or indemnification for the whole or any part of the loss or injury upon which the claim is founded; and, if so, when and from whom the same was received.

6. All testimony should be in writing, and upon oath or affirmation, duly administered according to the laws of the place where the same is taken, by a magistrate or other person competent by such laws to take depositions, having no interest in the claim to which the testimony relates, and not being the agent or attorney of any person having such interest, and it must be certified by him that such is the case. The credibility of the affiant or deponent, if known to such

magistrate or other person authorized to take such testimony, should be certified by him; and, if not known, should be certified on the same paper upon oath by some other person known to such magistrate, having no interest in such claim and not being the agent or attorney of any person having such interest, whose credibility must be certified by such magistrate. The deposition should be reduced to writing by the person taking the same, or by some person in his presence having no interest, and not being the agent or attorney of any person having an interest in the claim, and should be carefully read to the deponent by the magistrate before being signed by him, and this should be certified.

7. Depositions taken in any city, port, or place without the limits of the United States may be taken before any consul or other public civil officer of the United States resident in such city, port, or place, having no interest, and not being agent or attorney of any person having an interest in the claim to which the testimony so taken relates. In all other cases, whether in the United States or in any foreign place, the right of the person taking the deposition to administer oaths by the laws of the place must be verified.

8. Every affiant or deponent should state in his deposition his age, place of birth, residence, and occupation, and where was his residence and what was his occupation at the time the events took place in regard to which he deposes; and must also state if he have any, and, if any, what, interest in the claim to support which his testimony is taken; and, if he have any contingent interest in the same, to what extent, and upon the happening of what event, he will be entitled to receive any part of the sum which may be awarded. He should also state whether he be the agent or attorney of the claimant or of any person having an interest in the claim.

9. Original papers exhibited in proof should be verified as originals by the oath of a witness, whose credibility must be certified as required in the sixth of these rules; but when the fact is within the exclusive knowledge of the claimant it may be verified by his own oath or affirmation. Papers in the handwriting of anyone who is deceased or whose residence is unknown to the claimant may be verified by proof of such handwriting and of the death of the party or his removal to places unknown.

10. All testimony taken in any foreign language and all papers and documents in any foreign language which may be exhibited in proof should be accompanied by a translation of the same into the English language.

11. When the claim arises from the seizure or loss of any ship or vessel, or the cargo of any ship or vessel, a certified copy of the enrollment or registry of such ship or vessel should be produced, together with the original clearance, manifests, and all other papers and documents required by the laws of the United States which she possessed on her last voyage from the United States, when the same are in the

possession of the claimant or can be obtained by him; and, when not, certified copies of the same should be produced, together with his oath or affirmation that the originals are not in his possession and cannot be obtained by him.

12. In all cases where property of any description for the seizure or loss of which a claim has been presented was insured at the time of such seizure or loss, the original policy of insurance, or a certified copy thereof, should be produced.

13. If the claimant be a naturalized citizen of the United States, a copy of the record of his naturalization, duly certified, should be produced.

14. Documentary proof should be authenticated by proper certificates or by the oath of a witness.

15. If the claimant shall have employed counsel, the name of such counsel should, with his address, be signed to the memorial and entered upon the record, so that all necessary notices may be addressed to such counsel or agent respecting the case."¹

DEPARTMENT OF STATE,

Washington, March 5, 1906.

Paragraph 174 of the Instructions to Diplomatic Officers reads:

"The interposition of diplomatic representatives is often asked by their countrymen to aid in the collection of claims against the government to which they are accredited. If the claim is founded in contract, they must not interfere without specific instructions to do so. If it is founded in tort, they will, as a general rule, in like manner, seek previous instructions before interfering, unless the person of the claimant be assailed or there be pressing necessity for action in his behalf before they can communicate with the Department of State; in which event they will communicate in full the reasons for their action."²

§ 304. Interpretation of the Circular of 1906.

A few comments upon the scope and interpretation of the circular of 1906 may be appropriate. At the outset, it may be remarked that the circular is most liberally construed, and an approximate compliance with its terms, to the extent of making out a *prima facie* case on the merits and of proving citizenship and title to protection on the

¹ All papers filed by claimants in connection with the presentation of their claims are placed in the Department's files and thus become part of the government records, which may not thereafter be taken from the files for return to the claimants or for other purposes.

² Instructions to the diplomatic officers of the United States, 1897, § 174, p. 68.

part of the claimant will usually suffice to obtain the Department's assistance. The Department reserves and frequently exercises the right of calling for additional evidence upon matters which it deems insufficiently proved. Briefs on the law may also be required, and in this connection it may be said that while the claimant is merely required to state the facts in his case, with the evidence in support, it is well on doubtful matters to accompany the memorial with a brief in support of the legal merits of the claim in international law. Such a brief is often of much assistance to the law officers of the Department of State in determining whether the government's protection may be properly extended to the claimant.

The fact that a claim is founded in contract need not deter a claimant in good faith from presenting his memorial to the Department, for while under general principles a pure contract claim is not formally prosecuted, it has been shown ¹ within what narrow limits the rule operates. Moreover the use of good offices in support of a meritorious contract claim is usually extended, and is often as efficacious in securing the desired relief as the formal diplomatic pressure of a pecuniary claim.

The need for a memorial in triplicate arises out of the usual necessity of forwarding one copy of the memorial to the diplomatic or consular representative of the United States at the place where the alleged claim arose, for his investigation and report. This report is often required by the Department in order to verify as far as possible the truth of the *ex parte* statements of the claimant, and to assist it in arriving at a just conclusion as to the propriety of extending diplomatic assistance to the claimant. Many apparently good *prima facie* cases are thus upon investigation abroad found to be quite unworthy of support. It may be added that in first instance a formal memorial may not be necessary to bring the claim to the attention of the Department, but a mere letter of complaint, stating the case, with the evidence in support, will ordinarily suffice to enable the Department to direct its representative abroad to investigate and report. Upon receipt of a favorable report, the Department may request the claimant to file a formal memorial.

¹ *Supra*, § 114.

Rule 3 of the circular is designed to establish the citizenship of the real claimant at the origin of the claim, or the fact whether he has in any manner expatriated himself or forfeited protection by prolonged residence abroad.¹ Rules 4 and 5 are intended to establish the beneficial ownership of claims, and all matters of transferred interest and assignment.² These rules are also designed to establish compliance with the requirement that a claim must be national in origin as well as at the time of presentation and must have been continuously national in ownership, a rule which will be more fully considered presently.

It will be recalled that corporations invoking the assistance of the Department in support of a claim are required to file a properly certified copy of the charter or articles of incorporation, together with a duly executed instrument setting forth the ownership of the stock and bonds, including such a statement of the nationality of the holders as will show in whom the greater part of the real beneficial interest lies.³

With reference to Rule 15 it may be said that attorneys not of record must file a power of attorney from a directly interested claimant, before information concerning a claim will be given them. A change of counsel likewise must be accompanied by power of attorney.

Further conditions imposed by the Department, such as the exhaustion of local remedies, all absence of censurable conduct by the claimant, and other matters dependent upon the claimant's actions, will be discussed at more appropriate sections of this Part of the present work.

§ 305. Practice of International Tribunals.

The conditions for the presentation of claims prescribed by the circular of March 5, 1906, are to a large extent derived, as the circular states, from "those which have been adopted by commissions organized under conventions between the United States and foreign governments." The formal conditions necessary to admit a claim

¹ *Infra*, § 326.

² *Supra*, § 290 *et seq.*

³ *Supra*, § 279.

to the jurisdiction of an international commission are found in two sources, the treaty or protocol establishing the tribunal and the rules for the submission of claims adopted by the commission. Claimants failing to comply with these jurisdictional conditions are barred. For example, the Lasarte claim before the United States-Peruvian commission of 1863 was disallowed because the claimant had failed, as the treaty required, to file a statement of his claim in the ministry of foreign affairs of his country, asking the diplomatic interposition of his government.¹ The commission's requirements as to proof of citizenship, which are usually jurisdictional, are occasionally found, not only in the treaty or rules, but also in the decisions ("jurisprudence") of the commission.²

Domestic commissions established by Act of Congress are governed in their jurisdiction by the statute creating the commission and by the rules adopted. For example, the Act establishing the *Alabama* Claims court provided that no claim should be allowed "arising in favor of any person not entitled at the time of his loss, to the protection of the United States in the premises."³ Under § 4 of the Bowman Act of March 3, 1883,⁴ giving the Court of Claims jurisdiction over certain claims for stores and supplies, loyalty of the claimant throughout the war was a jurisdictional fact, and the claim was likewise barred if it had not previously been presented to some other department of the government.⁵

¹ *Lasarte (Peru) v. U. S.*, Jan. 12, 1863, Moore's Arb. 2390, 2395. See also *Kinney (U. S.) v. Peru*, *ibid.* 1626. The same result was reached in the case of certain claims before the U. S.-Mexican commission of 1839, Moore's Arb. 1244. The Department's circular of March 5, 1906 for this reason advises that "interposition" of the United States "should be requested in express terms."

² *Supra*, § 212.

³ Act of June 23, 1874, § 12, 18 Stat. L. 248.

⁴ 22 Stat. L. 485.

⁵ *Fors v. U. S.*, 19 Ct. Cl. 519, Senate Rep. 544, 55th Cong., 2nd sess., 6-7. See also *Fletcher v. U. S.*, 32 Ct. Cl. 36; *Nance v. U. S.*, 23 Ct. Cl. 463, and *McStea v. U. S.*, Moore's Arb. 2381. In cases transmitted under the Tucker Act loyalty is not a jurisdictional fact. *Chieve v. U. S.*, 42 Ct. Cl. 21. For the acts creating a few other domestic commissions or their rules see: Rules and regulations of Commissioners of Claims under Act of March 3, 1871, H. Misc. Doc. 12, 42nd Cong., 3d sess. 41-49. Decree (May 17, 1911) creating the Nicaraguan mixed claims commission, and rules of procedure, Managua, 1912. Acts creating Hawaiian court of claims, 87 St.

The rules of international and domestic commissions usually provide for the method of presenting claims, the documents which must be submitted, the formal contents of petitions or memorials, the necessary jurisdictional data concerning the claimant and the claim, the form of the papers, the method and time of filing, and other matters of pleading and procedure.¹

CLAIM MUST BE NATIONAL IN ORIGIN

§ 306. Impossibility of Nationalizing Claim by Naturalization or Assignment.

Few principles of international law are more firmly settled than the rule that a claim, in order to justify diplomatic support, must *when it accrued* have belonged to a citizen. This principle that a claim must be national in origin arises out of the reciprocal relation between the government and its citizens, the one owing protection and the other allegiance. If the claim did not originally accrue in favor of one owing allegiance, protection cannot be invoked or properly extended. To support a claim, originally foreign, because it happened to come into the hands of a citizen would make of the government a claim agent. The rule that "citizenship at the time the claim arose must be shown" is invoked by the Department of State to reject two classes of claims in which efforts have been made to nationalize a diplomatic claim originally held by a foreigner.

1. The first class covers cases where the original claimant, a foreigner when the claim accrued, becomes subsequently a naturalized citizen, and seeks the diplomatic interposition of the United States in support of his claim. This class of claimant is uniformly barred by the rule that naturalization is not retroactive but prospective only, and that the state of adoption cannot extend diplomatic redress to an individual in matters which arose before his admission to citi-

Pap. 1230. Claims against Cuba growing out of insurrection, Decree 158, Nov. 22, 1906, For. Rel., 1907, I, 298-301. Claims against Colombia, Decree of Feb. 17, 1886, 77 St. Pap. 805. At times the conditions imposed by certain Latin-American republics upon claimants against themselves have been considered by foreign governments as violations of international law. *Infra*, p. 849.

¹ See, *e. g.*, Rules of the British-American commission under art. XII of the treaty of May 8, 1871, 63 St. Pap. 1057, Hale's Rep. 177. Organic act of March 2, 1901, 31 Stat. L. 877, creating the Spanish Treaty Claims Commission, and preceding note

zenship.¹ While naturalization transfers allegiance, it does not transfer existing state obligations. "Subsequent naturalization does not alter the international status of a claim which accrued before naturalization."² It has already been observed that a declaration of intention is not sufficient to warrant diplomatic interposition.³

The Department of State has in a number of instances considered the rule as not applicable to cases in which the injury is a continuing one and constantly accruing, or where injuries inflicted prior to and subsequent to naturalization may be separated. In such cases, which, however, are exceedingly rare, the Department has interposed to obtain redress for injuries sustained subsequent to naturalization.⁴

2. The second class covers cases where the original claimant, a foreigner, assigns his claim to an American citizen or the claim, by operation of law, passes into the hands of an American citizen who seeks diplomatic protection. This class of claim is barred by the rule that the right of interposition is not assignable, and that the Department of State will not espouse a "nationalized" claim which came into American hands after it had accrued.⁵ Yet where a legal assignment of an interest, *e. g.*, a concession contract, is made to an American citizen prior to the origin of a claim, the claim is considered as having accrued to an American citizen and is not barred by the rule above mentioned.⁶

¹ Moore's Dig. VI, § 981; *supra*, p. 540.

² Mr. Bayard, Sec'y of State, to Mr. Golding, Apr. 30, 1886, Moore's Dig. VI, 637.

³ *Supra*, p. 566.

⁴ Mora's claim against Spain, Moore's Dig. VI, 637 and 1017-1021; For. Rel., 1894, App. I, 364-450; For. Rel., 1895, 1160-1177. Acosta's claim, Mr. Bayard, Sec'y of State, to Mr. Curry, Apr. 9, 1886, Moore's Dig. VI, 638. See also Santangelo (U. S.) v. Mexico, Apr. 11, 1839, Moore's Arb. 2550 (a claim arising subsequent to naturalization was allowed). But see Morris' case, Moore's Dig. VI, 633, and decisions of U. S.-Spanish Commission of 1871, *infra*, p. 663.

⁵ Moore's Dig. VI, § 982; For. Rel., 1894, 484-485. It is doubtful whether all foreign governments adhere so closely to this principle. Germany appears to have pressed against Haiti the claim of Funk and Ebersman, a debt originally due to a Haitian but assigned to this German firm. Report from American Legation at Port-au-Prince, No. 1119, Aug. 26, 1912. It is probable that such a settlement of a foreign claim would give the U. S. a good ground, based on discrimination, for urging the settlement of a similar American claim.

⁶ Mr. Hay, Sec'y of State, to Mr. Powell, Dec. 23, 1898, Moore's Dig. VI, 639.

§ 307. Decisions of International Tribunals of Arbitration.

These principles have frequently been applied by international claims commissions, where indeed it is believed they had their origin. The jurisdictional clause of treaties under which these commissions act usually provides for the adjudication of claims of "citizens of the United States." This provision has been held to require citizenship at the time of the origin of the claim, as well as at the time of presentation.

Under the first head, claims of naturalized citizens have been disallowed when it appeared that their naturalization occurred subsequent to the time of the original injury, under the general rule that naturalization has no retroactive effect to accord protection for injuries received prior to naturalization.¹

Claims have likewise been disallowed when their citizenship at origin was not established, even though they were presented by citizens of the claimant country.²

Nor will the fact that a declaration of intention had been filed at the time of the injury be considered the equivalent of citizenship at origin, even when naturalization followed.³ Reference has already

¹ Meyer (U. S.) v. Mexico, March 3, 1849, Opin. 756, not in Moore; Zander (U. S.) v. Mexico, *ibid.*, Moore's Arb. 3433 (*dictum*); Medina (U. S.) v. Costa Rica, July 2, 1860, *ibid.* 2483; Abbiatti (U. S.) v. Venezuela, Dec. 5, 1885, *ibid.* 2347; Southern Claims Commission, H. Misc. Doc. 16, 42nd Cong., 2nd sess.; and see argument in Perché (France) v. U. S., Jan. 15, 1880, Moore's Arb. 2401, 2408; Pinkerton land claim, 20 Op. Atty. Gen. (Miller), 118, 123.

² Parrott and Wilson (U. S.) v. Mexico, Apr. 11, 1839, Moore's Arb. 2381; same claim, Act of March 3, 1849, *ibid.* 2384; Santangelo (U. S.) v. Mexico, Apr. 11, 1839, *ibid.* 2549; Morrison (U. S.) v. Mexico, *ibid.* 2325; Dimond (U. S.) v. Mexico, *ibid.* 2387; Slocum (U. S.) v. Mexico, Apr. 11, 1839 and Mar. 3, 1849, *ibid.* 2382, 2385; Dwyer and Grammant (U. S.) v. Mexico, *ibid.* 2322; Sandoval (U. S.) v. Mexico, *ibid.* 2323; Lasarte (Peru) v. U. S., Jan. 12, 1863, Moore's Arb. 2390, 2394; Hargous (U. S.) v. Mexico, July 4, 1868, *ibid.* 2327; Fleury (U. S.) v. Mexico, *ibid.* 2156; Dusen-berg (U. S.) v. Mexico, *ibid.* 2157. See decisions cited *ibid.* 1353; Zayas (U. S.) v. Spain, Feb. 12, 1871, *ibid.* 2341; Prieto, *ibid.* 2339; Carrillo, *ibid.* 2237; Selway (U. S.) v. Chile, Aug. 7, 1892, *ibid.* 2557; Corvaia (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 809. See also Act of June 26, 1834, 6 Stat. L. 569, providing for East Florida claims of Spanish subjects. Peruvian indemnity, March 17, 1841, Atty. Gen. opinion, cited Moore's Arb. 4593. *Virginus* indemnity, case of Gen. Ryan, H. Ex. Doc. 14, 45th Cong., 1st sess.

³ Morrison (U. S.) v. Mexico, March 3, 1849, Moore's Arb. 2325; Ehlers (U. S.) v. Mexico, *ibid.* 2551; Ryder (U. S.) v. China, Nov. 8, 1858, *ibid.* 2332; Milatovitch

been made to the peculiar rule of some of the earlier decisions of the United States-Mexican commission of 1868 which held that proof of domicile in the United States plus a declaration of intention at the time of the origin of the claim constituted a sufficient title to admit the claimant to standing before the commission as a "citizen."¹ This conclusion was disavowed by Umpire Thornton in later decisions of that commission, and has ever since been regarded as erroneous.

A special provision in the United States-Spanish agreement of February 12, 1871 establishing a claims commission, to the effect that Spain could "traverse the allegation of American citizenship and thereupon competent and sufficient proof thereof will be required," was due principally to the large number of Cubans who had become naturalized in the United States, and the certainty that many of them had procured naturalization solely for the purpose of invoking American protection. The United States appears to have presented claims of this character, leaving it to Spain to dispute the good faith of the naturalization.²

Ingenious arguments were made before this commission in certain cases where property was seized or embargoed by Spain prior to the claimant's naturalization. Subsequent to the naturalization, an order of restoration or an order to pay for the property was left unexecuted or a decree of confiscation was issued. Claimants sought to circumvent the rule that citizenship is necessary when the claim arises, by basing their claims not upon the original embargo or seizure, but upon the failure to restore the property or pay for it in accordance with the orders, or upon the decree of confiscation. In all these cases, the decisions were to the effect that the injury dates from the original embargo or seizure, and that the retention of the property after the owner's naturalization is no new injury. The claims were, therefore, dismissed for lack of citizenship at origin.³

(U. S.) v. Mexico, July 4, 1868, No. 395, MS. Op. IV, 350; *Hutchinson v. U. S.*, Act of June 23, 1874 (Geneva award), *ibid.* 2359; *De Acosta (U. S.) v. Spain*, Feb. 12, 1871, *ibid.* 2462; *Prieto, ibid.* 2339; *Izquierdo, ibid.* 2340; *Wilson (U. S.) v. Chile*, Aug. 7, 1892, *Moore's Arb.* 2553, 2557.

¹ *Supra*, § 252.

² *Supra*, p. 523.

³ *Carrillo (U. S.) v. Spain*, Feb. 12, 1871, *Moore's Arb.* 2337; *Prieto, ibid.* 2339;

The rule that citizenship at origin of the claim is necessary is occasionally modified or set aside by the jurisdictional statutes or treaties under which commissions act. For example, the Act of June 23, 1874, establishing the court for the distribution of the Geneva award provided that the claimant must be "entitled at the time of his loss, to the protection of the United States in the premises." Under this provision, Rayner, J., delivering the opinion of the court, held that the Act rendered admissible the claims of all persons, native or naturalized, and even unnaturalized, who were at the time of their loss entitled to the protection of the United States flag on the high seas, except British subjects, who were not entitled to American protection or intervention as against their own government.¹

In view of the particular wording of the protocol of February 17, 1903, giving the United States-Venezuelan commission jurisdiction of claims "owned by citizens of the United States," it was held by Umpire Barge that the two governments had expressly contracted themselves out of the ordinary rule which requires that claims presented by a nation on behalf of its citizens should be national in their origin, and he took jurisdiction of a claim originally belonging to a foreign company but owned at the time of presentation by an American corporation.²

CITIZENSHIP AT TIME OF PRESENTATION

§ 308. Decisions of International Tribunals of Arbitration.

A practically uniform rule provides that to secure diplomatic support for a claim, it must be national at the time of its presentation, *i. e.*, owned, legally and beneficially, by a citizen. Although national in origin, therefore, it may be denationalized by its transfer to an alien, voluntarily or by operation of law, or by its original owner losing his citizenship.

Izquierdo, *ibid.* 2340; Zayas de Bazan, *ibid.* 2341; Simoni, *ibid.* 2347; De Acosta, *ibid.* 2347 and other cases cited on p. 2347.

¹ Worth and others *v.* U. S., No. 91, Davis' Rep., Washington, 1877, pp. 35-42, Moore's Arb. 2350.

² Orinoco Steamship Co. (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 72, 84. See also Anderson (U. S.) *v.* Venezuela, *ibid.* 167. "Owned" was construed to mean "owned at the time of the signing of the protocol."

Cases of this character have on numerous occasions been adjudicated by international tribunals. Under the customary form of jurisdictional article conferring upon the commission jurisdiction of claims of "citizens," it has usually been held that the claimant must aver and prove his citizenship at the time of the signature of the protocol or of the presentation of his claim. Thus, notwithstanding citizenship at the origin of the claim, if the claimant subsequently lost his citizenship,¹ or if the claim, by assignment² or operation of law³ came into the hands of an alien, it could no longer be presented as the claim of a "citizen," and such claims have been disallowed on jurisdictional grounds.

It has been held that a treaty providing for the adjudication of claims of "citizens of the United States," meant citizens at the date of the treaty.⁴ The Supreme Court of the United States believed such a provision to require citizenship both at the time of presentation and of judgment.⁵ The clause "owned by citizens of the United States" has been construed to mean owned at the time of the signature of the protocol, a claim subsequently coming into the hands of a citizen being disallowed.⁶

The death of a claimant after the presentation of his claim, it having satisfied the requirements of citizenship at origin and at the time of

¹ Gribble (Gt. Brit.) v. U. S., May 8, 1871, Hale's Rep. 14; Perché (France) v. U. S., Jan. 15, 1880, Moore's Arb. 2401-2418, Boutwell's Rep. 4-54. Mr. Boutwell states (p. 54) that there were 33 cases of persons claiming compensation, who were citizens of France when the losses occurred, but who had in the intervening period been naturalized as citizens of the U. S. These claims were all rejected.

² Jarrero (U. S.) v. Mexico, March 3, 1849, Moore's Arb. 2324; Benson (U. S.) v. Peru, Jan. 12, 1863, *ibid.* 2390; Mora (U. S.) v. Spain, Feb. 12, 1871, *ibid.* 2397; Camy (France) v. U. S., Jan. 15, 1880, *ibid.* 2398; *supra*, § 291.

³ Maxan's heirs (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2485; Lizardi (U. S.) v. Mexico, *ibid.* 2483; Levy (France) v. U. S., Jan. 15, 1880, *ibid.* 2514, 2518; Massiani (France) v. Venezuela, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 211; Brignone (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 720; Miliani (Italy) v. Venezuela, *ibid.* 759; Giacopini (Italy) v. Venezuela, *ibid.* 767. See also *supra*, § 283 *et seq.*

⁴ Sandoval and others (U. S.) v. Mexico, March 3, 1849, Moore's Arb. 2323; Beales (U. S.) v. Mexico, *ibid.* 2671 (nor was claimant a citizen at origin of claim).

⁵ Burthe v. Davis, 133 U. S. 514 (French-U. S. commission of Jan. 15, 1880).

⁶ Anderson (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 167, Morris' Rep. 357-359.

presentation, has been held not to bar the claim but to vest his interest in his legal representatives.¹

§ 309. Claim Must be Continuously National in Ownership.

The conclusion is inevitable that under ordinary circumstances a claim to be considered a national claim, must be national both in origin and at the time of presentation.² Moreover, according to the weight of authority, it must be continuously national in ownership, so that if at any time after its origin it has passed out of national hands or lost its national character, its nationality is not merely suspended but is completely destroyed, so that its reassignment to a citizen cannot revive its original nationality.³

It has already been observed⁴ that a commission usually looks to the citizenship of the real claimant and equitable owner rather than of the nominal claimant and ostensible owner.⁵

§ 310. Theory of Indirect Injury to the State. Criticism.

An injury to a citizen being an indirect injury to his state, it is quite apparent why the claim in its origin must accrue to a citizen, in order to receive diplomatic cognizance. It is not so clear in theory why a claim, which, having originally accrued in favor of a citizen, has passed

¹ *Chopin (France) v. U. S.*, Jan. 15, 1880, *Moore's Arb.* 2506; *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *Ralston*, 438, 455.

² *Moore's Arb.* 1353; *Wiltz (France) v. U. S.*, Jan. 15, 1880, *ibid.* 2254; *Young (U. S.) v. Mexico*, March 3, 1849, *ibid.* 2753 (*dictum*); *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *Ralston*, 438, 455; *supra*, § 306 *et seq.*

³ Kane's notes . . . under the convention with France, July 4, 1831, *Phila.* 1836, pp. 13, 21, *Moore's Arb.* 4471; *Slocum (U. S.) v. Mexico*, March 3, 1849, *Moore's Arb.* 2385 and *Dimond (U. S.) v. Mexico*, *ibid.* 2386 (*dictum*); *Loehr (U. S.) v. Venezuela*, Dec. 5, 1885, *Opinions of the Commission*, 87 (claim American in origin, sold to foreigner, and reassigned to American was barred); *Treaty between Spain and Peru*, Jan. 27, 1865, art. 5, *Martens' Nouv. Rec. Gen.* XX, 607. See *contra Petit (France) v. U. S.*, Jan. 15, 1880, No. 255, *Boutwell's Rep.* 84 (claimant a French citizen when claim arose, subsequently became naturalized as an American citizen and later became reintegrated as a French citizen. The claim was allowed). See also *dictum* in disallowed claim of *Nicrosi (France) v. U. S.*, *ibid.*, No. 415, *Boutwell's Rep.* 87.

⁴ *Supra*, § 283 *et seq.*

⁵ The exceptions to this general rule which in some cases enabled persons not citizens to recover awards, have been noted, *supra*, § 295 *et seq.*

into the hands of an alien, should necessarily forfeit the protection of its original government, especially where it passes not by voluntary assignment but by operation of law. If the state has been injured by the original wrong done to its citizen, the mere transfer of the claim hardly seems to purge the national injury to the state. A few decisions, in fact, have accorded an administrator or executor the right to receive an award on behalf of the estate of a deceased citizen, notwithstanding the alienage of the heirs or direct beneficiaries.¹ The weight of authority, however, is opposed to this finding. The general rule can only be explained on the ground that diplomatic protection is merely a supplementary or extraordinary legal remedy, which has no absolute sphere of operation, and may be modified in application wherever it appears reasonable.²

CONSULAR REGISTRATION OF CITIZENS

§ 311. Its Relation to Protection.

In order to facilitate diplomatic protection, and the necessary proof of citizenship upon which it depends, many governments provide for the registration in consular offices of their citizens residing abroad. France, Italy, Belgium, Spain, Portugal, Norway, and, since 1907, the United States, are among the countries which have adopted this system. The effect of consular registration is not the same in all countries, but its general purpose is to give the home government information as to the number and distribution of its citizens abroad, to furnish evidence of a desire of the citizen to retain his original nationality, and to afford an official record of his identity and political status to the consul and to the local authorities.³ Registration is in itself there-

¹ *Supra*, § 285. See the memorandum of the oral argument of the U. S. in support of this proposition in the Studer claim, No. 32, before the American and British Claims Com., Aug. 18, 1910, and the contention of the British agent in the Stevenson case *v. Venezuela*, Feb. 13, 1903, Ralston, 439.

² *Supra*, p. 352.

³ In the case of *Esteves (Spain) v. Venezuela*, April 2, 1903, Ralston, 922, registration in the Spanish consulate and a certificate of registration were accepted as *prima facie* evidence of Spanish nationality. The same rule was applied by the Arbitrator of the Italian-Peruvian commission under the protocol of Nov. 25, 1899, Descamps and Renault, Rec. int. des traités du xx^e siècle, 1901, p. 701 *et seq.*

fore a precautionary measure of protection, and its importance in facilitating the extension of protection when a case arises will be readily apparent. It is not, however, a guarantee of protection.¹

It was for some time a matter of doubt among continental publicists whether consular registration was a *sine quâ non* of protection, or whether it was merely recommended by the government in the citizen's own interest and optional, therefore, with the citizen himself. The difficulty appears to have been created by the French decree of November 28, 1833, which provides that "Frenchmen residing abroad, who wish to assure themselves of consular protection in the district in which they reside . . . shall have themselves inscribed, upon proof of their nationality, in the registration book kept for this purpose at each consulate." The concensus of opinion now is that registration is not an absolute condition precedent to protection, for this should depend not upon a mere administrative formality, but upon proof of citizenship. While registration, therefore, is desirable, and consuls are urged to persuade their nationals to register, it is not absolutely necessary to protection.²

Failure to register may, however, have a very important bearing on protection through its legal effect upon citizenship. Under the Act of March 2, 1907, registration is a necessary condition for the retention or resumption of American citizenship, as the case may be, on the part of foreign-born women abroad, the widows or divorced wives of American citizens, or of native women abroad, the widows

¹ Mr Knox, Sec'y of State in For. Rel., 1910, 198.

² Pradier-Fodéré, P., *Cours de droit diplomatique*, 2nd ed., Paris, 1899, I, 543-548, Pradier-Fodéré, *Traité*, III, § 1376; De Clercq, A., and De Vallat, C., *Guide pratique des consulats*, 5th ed., Paris, 1898, § 330 *et seq.*; Pittard, E., *La protection des nationaux à l'étranger*, Geneva, 1896, 185-187. Failure to register may, however, have important legal effects, *e. g.*, only a registered Frenchman may be a witness to certain instruments, or be the sole owner of a ship flying the French flag. De Clercq and De Vallat, § 331. In some countries, like Spain, the consular registration of subjects abroad affected with a dual nationality, is necessary to manifest an election of nationality. Its effect in the U. S. will be considered presently. Pradier-Fodéré states that during his experience in South America certain French consular officers made registration a condition of protection, of which practice Pradier-Fodéré unequivocally disapproves. The majority of the consular regulations of Latin-American countries expressly provide that their representatives abroad shall not refuse protection to unregistered nationals, *op. cit.*, 547.

or divorced wives of foreigners.¹ It operates also, under certain circumstances, as an election of citizenship on the part of children born abroad of American fathers.²

§ 312. Registration in Extraterritorial Countries.

Great Britain and some other countries make the registration of their subjects compulsory in certain Oriental countries in which extraterritorial rights are exercised.³ In some states, *e. g.*, Siam, the requirement of registration is expressly mentioned in the treaty, the privileges therein granted being extended only to registered subjects.⁴ In other cases, it is made compulsory by Order in Council. In some states, *e. g.*, China, non-compliance is made punishable by fine.⁵ Failure to register does not exempt the person from consular jurisdiction, but forfeits the right to protection. The general custom in certain countries in which extraterritorial privileges are enjoyed, of furnishing the local authorities with lists of nationals, foreigners and protégés under consular jurisdiction renders registration in some form almost a necessity and it is probable that the United States will soon follow the example of Great Britain by making registration in certain Eastern countries compulsory.⁶

§ 313. Proof of Citizenship Necessary. Consular Regulations.

The same proof of citizenship is required for consular registration as is required by the Department of State for the issuance of a passport. Paragraph 172 of the Consular Regulations, as amended by the Executive order of April 8, 1907, now governs the matter of registration of American citizens. It was notified to the representatives abroad of the United States by a circular of April 19, 1907. The paragraph reads:

¹ These provisions, §§ 3 and 4 of the Act of 1907, have been fully considered in the discussion of the subject of married women, *supra*, §§ 265, 267.

² Section 6 of the Act of March 2, 1907, *supra*, § 271.

³ Hall, W. E., Foreign powers and jurisdiction, § 62; Piggott, F., Extraterritoriality, 163; Hinekey, Consular jurisdiction, 83. See British instructions to consular officers regulating the registration of British subjects in foreign countries, October, 1907, 100 St. Pap. 24-27.

⁴ Piggott, Extraterritoriality, 163. See also treaty between Denmark and Siam. March 24, 1905, 101 St. Pap. 289.

⁵ British China Order, art. 162, Piggott, 164.

⁶ See Mr. Denby's despatch to Sec'y Olney, Nov. 27, 1896, For. Rel., 1896, 90.

"172. Registration of American Citizens.—Principal Consular Officers should keep at their offices a Register of all American citizens residing in their several Districts, and will therefore make it known that such a Register is kept and invite all resident Americans to cause their names to be entered therein. The same general principles govern applications for registry which govern applications for passports (Paragraph 151).

"The Register should show the date of registration, the full name of the person registered, the date and place of his birth, the place of his last domicile in the United States, the date of his arrival in the foreign country where he is residing and his place of residence therein, the reasons for his foreign residence, whether or not he is married and if married the name of his wife, her place of birth and residence, and if he has children the name, date and place of birth and residence of each. The nature of the proof accepted to establish his citizenship should also appear, and his signature should be inscribed in the Register.

"Consuls may issue certificates of the registration prescribed above for use with the authorities of the place where the person registered is residing. Each certificate shall set forth the facts contained in the Register and shall be good for use for one year only and shall be in form prescribed by the Secretary of State. (Form No.—). When a certificate expires a new one may be issued, the old one being destroyed, if it is clearly shown that the residence abroad has not assumed a permanent character. Persons who hold passports which have not expired shall not be furnished with certificates of registration, and it is strictly forbidden to furnish them to be used for travelling in the place of passports. Returns of all registrations made and of all certificates of registration issued shall be made to the Embassy or Legation in the country in which the Consulate is situated and to the Secretary of State at intervals and under regulations to be prescribed by him. No fee will be charged for registration nor for any service connected therewith, nor for certificates of registration.

"This Paragraph shall go into effect July 1, 1907."

After setting forth the form in which the certificate of registration shall be issued, the circular ends:

"Immediately upon the registration of an American citizen the fact of such registration should be certified to the embassy or legation in the country in which the consulate is situated, and a duplicate of the registration should be forthwith sent to this Department, together with a statement whether a certificate of registration has been issued.

"When a certificate of registration shall have expired and a new one has been issued notice of this fact should be sent immediately to the embassy or legation in the country in which the consulate is situated, and to this Department.

"American citizens resident abroad are required to register each year,

and any additional facts concerning residence, marriage, and children should be noted in the register, but the full registration having been made once need not be repeated on each subsequent registration.”¹

“ELIHU ROOT”

The circular of November 30, 1907, instructs consuls specifically to apply to applicants for registration the rules of the circular of April 19, 1907 entitled “Expatriation,”² which embodies the provisions of the Act of March 2, 1907 and certain rules of evidence for overcoming the presumption of expatriation. Consuls are informed that the Department expects them “to use their best endeavors to secure the registration of all American residents in their districts,” although the registration of travellers and brief sojourners is not, under ordinary circumstances, contemplated. The supplementary circular instruction of March 2, 1908, informs consuls that applications for registration need not in ordinary cases be made in the form of an affidavit.³ A further circular of June 21, 1909 requires the consul to insert in the register and the certificate “the local address of the person registering and the name and address of the nearest relative in America with whom it would be necessary to communicate in the event of any serious accident to or death of the person registered.” In a circular instruction of December 21, 1914, diplomatic and consular officers are informed that in the issuance of emergency passports and the renewal of Departmental passports, consular registration certificates should not be accepted as conclusive evidence of citizenship.

Attention has already been given to the circulars of April 19, 1907 regarding the registration of women who desire to resume or retain American citizenship⁴ and the registration of children of American citizens born abroad.⁵ The circular of January 18, 1908 authorizes consuls to enter the name of a Japanese wife with the registration of her husband, for the certificate of registration merely states that

¹ Circular instruction, Registration of American citizens, April 19, 1907, For. Rel., 1907, I, 6-7.

² *Infra*, § 319.

³ Circular Instruction, “Applications for registration,” March 2, 1908.

⁴ For. Rel., 1907, I, 10, *supra*, §§ 265, 267.

⁵ *Ibid.*, 1907, I, 9, *supra*, § 271.

the head of the family, to whom it is issued, is an American citizen, and does not state specifically that his wife and children are citizens.¹

A circular of December 9, 1911 authorizes consular officers to register citizens of Porto Rico and the Philippines, under the terms of the Acts of April 12, 1900 and July 1, 1902, respectively. The citizens in question are "required to produce sworn applications as to birth and residence, accompanied by the best documentary evidence procurable that they were Spanish subjects at the time of the annexation of the islands," and their statements must be supported "by affidavits of two credible persons, as in applications for insular passports." Duplicate certificates of registration are not to be issued to persons claiming citizenship of Porto Rico or the Philippines until their applications have been approved by the Department.²

The circular of April 19, 1907 provides that registration shall be made before principal consular officers, but inasmuch as registration is optional and not mandatory, it is possible that registration at legations or before diplomatic agents would serve the same purposes.

The provisions of local legislation in various countries requiring foreigners to be registered or matriculated in the office of a local authority as a condition precedent to the enjoyment of certain domestic privileges have been recognized as valid by the United States. A similar provision debarring foreigners, not matriculated, from the diplomatic protection of their own government has been vigorously opposed by the United States, on the ground that the "evidence of the foreign status of an individual consists of the facts as they exist, or of the authentic certification of his own government, as in the form of a passport"; it does not originate in the compliance with the municipal statute of a foreign country.³

¹ Circular of January 18, 1908, "Issuing passports to or registering Japanese wives of American citizens and their children born in Japan."

² Circular of December 9, 1911, "Registration of citizens of Porto Rico and the Philippine Islands."

³ Mr. Olney, Sec'y of State, to Mr. Dupuy de Lôme, Feb. 17, 1896, For. Rel., 1896, 677. These attempted limitations upon diplomatic protection found in the legislation of various Latin-American countries are considered at greater length in Chapter VII, *infra*, § 394.

OTHER CONDITIONS

§ 314. Fulfillment of Duties of Citizenship.

Other conditions imposed by governments upon an applicant for diplomatic protection contemplate a fulfillment of his duties of allegiance and an absence of all censurable conduct justifying the state in withholding or withdrawing its protection. Several European governments, like France,¹ for example, forbid their diplomatic and consular representatives to protect citizens who have failed to submit to the obligations of military service. In the following chapters,² attention will be directed toward those acts of the claimant which have operated as a forfeiture of the right to diplomatic protection.

¹ Circular of June 16, 1873, renewed by that of Nov. 5, 1905; Pillaut, *Manuel de droit consulaire*, Paris, 1910, § 139.

² *Infra*, §§ 315 *et seq.*

CHAPTER II

FORFEITURE OF PROTECTION BY ACT OF CITIZEN. EXPATRIATION

§ 315. Recognition as an Individual Right. History in United States.

Expatriation, or the voluntary renunciation or abandonment of citizenship and allegiance, is obviously the most direct method by which diplomatic protection may be forfeited. As in the case of emigration,¹ it is only within the last fifty years that states have come to recognize that the feudal theory of indissoluble allegiance is an anachronism, and that the individual has the right to change his domicile and nationality, although the reciprocity of obligation between the individual and the state of which he is a member still requires, in many states, the consent of the government to a recognition of the change of allegiance.²

¹ Bar, L. von, *Theory and practice of private international law*, Edinburgh, 1892, pp. 145-147.

² The countries of Europe in which military service is compulsory do not recognize, except so far as they have become bound by treaty, the expatriation of their subjects, without the consent of the state or the prior performance of military duty. *Supra*, § 238. Even the naturalization treaties recognizing expatriation do not relieve the expatriated person from obligations incurred prior to emigration, should he return to his native country. The following countries of Europe have not concluded naturalization treaties with the U. S. recognizing the expatriation of their subjects: France, Italy, Switzerland, The Netherlands, Roumania, Servia, Spain, Russia and Turkey, *Supra*, § 239. Russia and Turkey still maintain the doctrine of indelible allegiance, and deny the right of voluntary expatriation, except in the case of the marriage of native women to aliens. In practically all the other countries of Europe, the consent of the state is obtainable upon proof of the fulfillment of military obligations. The various attitudes of governments on the question of expatriation are set forth in H. Doc. 326, 59th Cong., 2nd sess., 12 and are discussed *supra*, p. 544 and *infra*, p. 684.

Publicists now universally admit that a citizen has the general right of expatriation in time of peace, and in the absence of prohibition or qualification, the assent of the government is implied. *E. g.*, Bluntschli, art. 372; Bar, § 60; Fiore, 4th ed.,

In the development of the policy of the United States the doctrine of expatriation has experienced numerous vicissitudes.¹ The courts of the United States, prior to 1868,² generally accepted the common law doctrine of perpetual allegiance, Chancellor Kent laying down the rule "that a citizen cannot renounce his allegiance to the United States without the permission of government."³ While the views of the executive department of the government were by no means consistent, the opposite doctrine, namely, the freedom of expatriation, was generally maintained. In this connection, it must be remembered that the question was considered by the executive practically always from the point of view of a foreigner abjuring his native allegiance to become a citizen of the United States. In some cases the United States disavowed any intention to protect a naturalized citizen in his native country when the latter, by its municipal law, still considered him as its subject.⁴ Buchanan during the years 1845-1848 was the first Secretary of State to announce the unqualified right of expatriation, namely, that naturalization clothes the individual with a new allegiance and releases him from the obligation of the old;⁵ and after art. 653; Bonfils, § 417; Stoerk, in 2 R. G. D. I. P. (1895), 287; Halleck, 1908 ed., I, ch. XII, § 29.

¹ On the American law governing expatriation see Van Dyne, *Citizenship*, Rochester, 1904, §§ 89-99; Van Dyne, *Naturalization*, Washington, 1907, pp. 333-362; Moore's Dig. III, §§ 431-440; 466-473; Moore, J. B., *American diplomacy*, New York, 1905, chap. VII; Report of Citizenship Board, H. Doc. 326, 59th Cong., 2nd sess., 12-13, 23-28; 160-168; Opinions of executive officers, and appendixes, For. Rel., 1873, II, 1185 *et seq.*

² *Inglis v. Trustees of the Sailor's Snug Harbor*, 3 Pet. 99; *Shanks v. Dupont*, 3 Pet. 242, 246; *The Santissima Trinidad*, 7 Wheat. 283. *Contra*, *Alsberry v. Hawkins*, 9 Dana (Ky.), 178. These and some other cases are considered in *Comitis v. Parkerson*, 56 Fed. 556, 558-561. See also Moore's Dig. III, § 432, and H. Doc. 326, 59th Cong., 2nd sess., 160-161.

³ 2 Kent's Commentaries, marg. 49. See also the views of Story set forth in Moore, *American diplomacy*, 171-172. It was recognized by Kent and by the Supreme Court in *Shanks v. Dupont* that this theory of perpetual allegiance was inconsistent with our naturalization laws, but it was said that only Congress could correct the inconsistency.

⁴ See Mr. Wheaton's celebrated declaration in Knoche's case in Prussia, July 24, 1840, Moore's Dig. III, 564 and *supra*, p. 542. See also Sec'y of State Webster, Everett and Marcy, Moore's Dig. III, § 436. See also Cushing, Atty. Gen., Oct. 31, 1856, in 8 Op. 139 and Moore, *American Diplomacy*, 177.

⁵ Moore's Dig. III, § 435.

1857, when Buchanan became President, the doctrine was reasserted in all its force.¹ The increase of immigration, with the growing demand for the protection of naturalized citizens returning to their native countries, also influenced the views of the Executive,² until finally in 1868, following the arrest in Ireland as British subjects of certain naturalized American citizens of British origin, implicated in the Fenian agitation, Congress passed an Act in which it was declared that "the right of expatriation is a natural and inherent right of all people" and that "any declaration, instruction, opinion, order, or decision of any officer of this government which denies, restricts, impairs, or questions the right of expatriation" is "inconsistent with the fundamental principles of this government."³ Almost at the same time a number of naturalization treaties with various states of Europe were concluded and in 1870 Great Britain departed from its time-honored position by recognizing the right of voluntary expatriation of British subjects.

Since 1868, the courts⁴ and the Executive⁵ have with practical uniformity sustained the right of an alien to abjure his native allegiance and by becoming a citizen of the United States to clothe himself with the right of American citizenship and protection as against all nations. While the legislative declaration of the equality of native and naturalized citizens abroad was confirmed in numerous expressions of executive opinion, nevertheless, as has already been observed,⁶ a distinction was made between persons who emigrated to the United States under a prospective liability to military service which had not yet

¹ Moore's Dig. III, § 437.

² The expressions of executive opinion during Buchanan's administration are set forth in Moore's Dig. III, § 437. See especially Atty. Gen. Black's opinion in Ernst's case, July 4, 1859, 9 Op. 356. See also Moore, American diplomacy, 178-182. For the position of the U. S. during the Civil War, see Moore's Dig. III, § 438.

³ 15 Stat. L. 223, R. S., § 1999, 1 Fed. Stat. Ann. 788. The language of R. S., §§ 2000 and 2001 (*supra*, p. 460) was also included in the Act of 1868. For the history of the Act of 1868 see Moore's Dig. III, § 439 and American diplomacy, 183-188.

⁴ *Green v. Salas* (1887), 31 Fed. 106, 113; *In re Look Tin Sing* (1884), 21 Fed. 905, 908; *Browne v. Dexter* (1884), 66 Cal. 39 (expatriation of American citizen); *In re Rodriguez* (1897), 81 Fed. 337, 354; *Boyd v. Nebraska* (1892), 143 U. S. 135, 161.

⁵ Extracts printed in 2 Wharton, § 171 and in Moore's Dig. III, § 440.

⁶ *Supra*, p. 539.

matured, and those who emigrated to evade military duties which had already been fixed upon them. It was admitted that upon return to their native countries the latter class could not make use of their American naturalization to escape obligations and penalties incurred prior to their original emigration to the United States. Even in the naturalization treaties, beginning with the epoch-making Bancroft treaties, which the United States has succeeded in concluding with various countries,¹ and in which the right of expatriation under certain conditions is recognized, this principle of continued liability in the native country for obligations incurred prior to emigration is admitted.²

§ 316. Diplomatic Relations with Countries not Recognizing Expatriation as Individual Right.

In its diplomatic relations with countries with which no naturalization treaties have been concluded, the United States has often been unsuccessful in securing recognition for its supposedly traditional doctrine of voluntary expatriation.³ This is due to the fact that every independent state possesses exclusive territorial sovereignty and is entitled to its own views as to the nature and extent of the right of expatriation, and as international law embodies no rules concerning naturalization, the effect of naturalization upon previous citizenship is a matter governed by the municipal law of the states directly concerned.⁴ Thus, however morally wrong may be the Russian and Turkish principle of perpetual allegiance, the United States has been unable to impress its views as to the right of voluntary expatriation upon the Russian and Turkish governments so as to secure for naturalized American citizens of Russian or Turkish origin a release from their native allegiance. Similarly, in countries like France, Servia and others, where by municipal law governmental consent or the performance of military duty is a condition precedent to a change of allegiance, mere naturalization in the United States is regarded as without effect upon native allegiance when the preliminary condi-

¹ *Supra*, § 239.

² *Supra*, p. 549.

³ *Supra*, §§ 237, 238.

⁴ Taylor, 227; Halleck, 3rd ed., I, 411; Oppenheim, I, 359.

tion remains unfulfilled.¹ It would seem, therefore, that in the absence of consent or treaty, naturalization abroad has within the limits of the country of origin no other effect than the government of that country may be willing to concede.

§ 317. Inconsistencies of Law and Practice with Principles of Act of 1868.

Attention may be called to various inconsistencies, in the law and practice of the United States, with the high-sounding phrases of the Act of 1868. Inasmuch as expatriation has been said to include both emigration and naturalization,² it seems clear that laws which restrict naturalization to free white persons and those of African nativity, excluding other races, violate the declaration that expatriation "is a natural and inherent right of all people." Again, the occasional executive admission that naturalized citizens, natives of a country which does not recognize the validity of their expatriation, owe in international law a dual allegiance would signify a contradiction to the doctrine embodied in the Act of 1868 that naturalization invests the individual with a new and single citizenship and absolves him, therefore, from the obligations of any former allegiance. So again, while the courts have found in the Act of 1868 that governmental consent to expatriation, the absence of which, prior to 1868, led the courts generally to deny the right of expatriation, the Act of March 2, 1907 would seem to repudiate that unqualified consent and right by providing "that no American citizen shall be allowed to expatriate himself when this country is at war."³ However strongly we may uphold the principle that it is the duty of governments under proper restrictions to permit the expatriation of their nationals, a duty which most governments now fulfill, the conclusion is inevitable, both under international and municipal law, that there is no such thing as the inalienable and inherent right of a citizen to expatriate himself.

¹ *Supra*, § 238.

² Black, Atty. Gen., in Ernst's case, 9 Op. 356, Bluntschli, 5th ed., art. 371 and Fiore, 4th ed., art. 654, to the effect that the old nationality subsists until a new one is acquired. *Supra*, p. 567. Other publicists, more in conformity with the practice of most states, dispute that expatriation requires naturalization abroad. *E. g.*, Bar, § 60 and note, in which he criticizes the views of Stoerk.

³ Act of March 2, 1907, § 2; 34 Stat. L. 1228.

§ 318. Expatriation of American Citizen.

Turning now to the special question of present interest—the right of an American citizen to expatriate himself—it will be found, as already observed, that the courts prior to 1868 appear in several cases to have denied the right in the absence of an authorizing statute of Congress.¹ Chief Justice Marshall in 1804, however, declared that a citizen who made himself the subject of a foreign power, thereby placed himself out of the protection of the United States.² Before 1868, there was no federal legislation concerning expatriation, and the Act of that year, apart from its high-sounding preamble, deals only with the protection of aliens by birth who have become citizens of the United States. Since 1868, the courts have generally held that the Act declares the right of an American citizen to expatriate himself.³ But a change of domicil has been held essential to a change of allegiance,⁴ and it has been noted that with one exception, up to 1907, in the case of the marriage of an American woman to an alien—in which denationalization is now almost universally admitted—no change of citizenship without change of domicil was recognized. The preamble of the Act of 1868 was held by Attorney-General Williams in 1873 to comprehend our own citizens as well as aliens,⁵ and the Executive had in fact from the beginning recognized that an American citizen could by appropriate steps divest himself of his American citizenship. Nor is proof of the acquisition of another nationality any longer required as a condition of expatriation.

¹ *Supra*, p. 675, notes 2 and 3.

² *Murray v. The Charming Betsy* (1804), 2 Cranch, 64, 119 (*dictum*). He had reference, however, to commercial domicil only.

³ *Jennes v. Landes* (1897), 84 Fed. 73; *Browne v. Dexter* (1884), 66 Cal. 39; *U. S. v. Wong Kim Ark* (1898), 169 U. S. 649, 704 (*dictum*).

⁴ *Talbot v. Janson*, 3 Dall. 133; *The Santissima Trinidad*, 7 Wheat. 283, 9 Op. Atty. Gen. 62. Except in the case of women married to aliens, this is practically a universal rule. The question whether the American-born wife of an alien who remains within the jurisdiction of the United States can legally be deprived of her citizenship, *i. e.*, expatriated, as Congress has provided by the Act of 1907, will be squarely presented to the U. S. Supreme Court in the appeal from the decision of the California Supreme Court in *McKenzie v. Hare*, *supra*, p. 602.

⁵ 14 Op. Atty. Gen. 295.

§ 319. Methods of Expatriation.

Although Congress in 1868 asserted the abstract right of expatriation, it did not until 1907 declare when and under what circumstances a native citizen of the United States shall be deemed to have lost his citizenship.¹ The Department of State, therefore, in the absence of any statutory definition of the modes of expatriation had to determine each case on its particular merits, with results by no means consistent. As will be observed hereafter, prolonged residence abroad has often been held to create a presumption, rebuttable by appropriate evidence, of the renunciation of citizenship and protection.²

The Act of March 2, 1907 prescribes four methods by which expatriation may be effected; (1) by naturalization in a foreign state; (2) by taking the oath of allegiance to a foreign state; (3) by marriage of an American woman to a foreigner; and (4) by residence abroad, for certain periods of time, on the part of a naturalized citizen. The principal provisions of the Act read:

"That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state (§ 2).

"That any American woman who marries a foreigner shall take the nationality of her husband (§ 3).

"When any naturalized citizen, shall have resided for two years in the foreign state from which he came, or for five years in any foreign state, it shall be presumed that he has ceased to be an American citizen . . . Such presumption may be overcome on the presentation of satisfactory evidence . . ." (§ 2).

It is expressly provided "that no American citizen shall be allowed to expatriate himself when this country is at war."³ It has also been held that a corporation cannot expatriate itself.⁴

¹ President Grant urged Congress to define the acts which shall work expatriation. For. Rel., 1875, I, vii; 1874, x.

² *Infra*, § 326.

³ The public policy upon which this provision is based is set forth in H. Doc. 326, 59th Cong., 2nd sess., 28. See also Cockburn, Nationality, 201-202; Halleck, International law, London, 1908, I, ch. XII, § 29. Duer on Marine Insurance, I, lecture 5, § 35. The *Santissima Trinidad*, 7 Wheat. 283, 347 (*dictum*). A somewhat similar rule appears to prevail in Great Britain. *R. v. Lynch* (1903), 1 K. B. 444; Foote, J. A., Foreign and domestic law, 3rd ed., London, 1904, pp. 4, 7.

⁴ *North and South American Construction Co. (U. S.) v. Chile*, Aug. 7, 1892, Moore's Arb. 2319.

Full consideration has already been given to the citizenship of married women,¹ and in a subsequent section² the effect of prolonged residence abroad upon citizenship and protection, both in the case of native and of naturalized citizens, is to be discussed, together with the methods of overcoming any resulting presumption of expatriation. For the present, therefore, attention will be confined to the two most direct methods, foreign naturalization and oath of allegiance to a foreign state, by which expatriation may be effected.

Even before the Act of 1907, the political department of the government uniformly recognized foreign naturalization as a valid method of expatriation.³ Other formal acts of renunciation of American citizenship with intent to become a citizen of a foreign country had also been admitted as having this effect.⁴ While the forms of naturalization abroad may differ from those known to our law, if they are voluntarily undertaken by an American citizen with knowledge of their legal effect his denationalization will be recognized.⁵ Although requests have frequently been made upon the Department of State for certificates admitting the renunciation of American allegiance on the part of a particular citizen, these have always been refused on the ground that expatriation is freely recognized by the United States, and that by the mere fact of naturalization in a foreign country the in-

¹ *Supra*, § 263 *et seq.*

² *Infra*, § 326 *et seq.*

³ Mr. Bayard, Sec'y of State, to Count Sponneck, Apr. 10, 1888, For. Rel., 1888, I, 489; Mr. Gresham, Sec'y of State, to Mr. White, Oct. 2, 1894, For. Rel., 1894, 557; Moore's Dig. III, 714. It was recognized by the courts after 1868. *Browne v. Dexter* (1884), 66 Cal. 39; *Newcomb v. Newcomb* (1900), 57 S. W. 2; and in some cases even before 1868; *Murray v. The Charming Betsy*, 2 Cranch, 119 (*dictum*).

⁴ Williams, Atty. Gen., in 14 Op. 295, and in 14 Op. 154.

⁵ Mr. Hay, Sec'y of State, to Mr. Smith, Nov. 6, 1898, Moore's Dig. III, 730 (taking out an allotment of land in Liberia, open to citizens only); Mr. Seward, Sec'y of State, to Mr. Foster, August 13, 1879, For. Rel., 1879, 824 (taking military service in Mexico, thus becoming a naturalized Mexican); *Martin (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2467; *Prim (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2482; von Bar, § 59; *Kircher v. Murray*, 54 Fed. 617; Mr. Hay, Sec'y of State, to Mr. Turley, Apr. 6, 1899, Moore's Dig. III, 735. In *Martin (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2467 and in *Greene (U. S.) v. Mexico*, *ibid.* 2756 it was held that where military service in Mexico conferred Mexican citizenship, American citizenship was lost during the time of the service. It is believed that American citizenship was confused by the Commission with diplomatic protection.

dividual is to be regarded as having lost his rights as an American citizen.¹

The circular instruction of April 19, 1907 on expatriation provides that

"whenever it comes to the knowledge of a diplomatic or consular officer that an American citizen has secured naturalization in a foreign state in conformity with its laws, or has taken an oath of allegiance to a foreign state, such diplomatic or consular officer should certify to the facts under his seal and should transmit the certification to [the] Department. If the citizen who has thus acquired foreign naturalization was a naturalized citizen of the United States, the fact should be stated in the certification and the certificate of American naturalization should, if possible, be taken up and forwarded to the Department with the certification."

A second mode of expatriation provided for by the Act of 1907 is by taking an oath of allegiance to a foreign state. From previous departmental rulings as to the effect upon citizenship of an oath of allegiance to a foreign country, it may be said that the oath which operates as a method of expatriation must involve the acquirement of citizenship in the foreign state and renunciation of American citizenship.² Thus, at different times it has been held that the oath taken as a prerequisite to obtain certain local privileges in a foreign country, such as the right to fly the flag of the country,³ the right to enter certain lines of business,⁴ or to practice certain professions,⁵ or other qualified oath which did not involve the acquirement of local citizen-

¹ Moore's Dig. III, 714-715; For. Rel., 1908, 29-31.

² Mr. Forsyth, Sec'y of State, to Mr. Emerson, Jan. 23, 1839, Moore's Dig. III, 719. See also Lord Enfield to Mr. Rickmers, Feb. 4, 1871, 61 St. Pap. 1091.

³ Extract from Life and Writings of B. R. Curtis, set forth in Moore's Dig. III, 721. In this case, however, the citizen did not become domiciled in the state of the flag, Hamburg, which fact had an important bearing on the opinion rendered.

⁴ The letters of domiciliation issued in Cuba in the middle of the last century. Webster's final opinion in Thrasher's case, quoted in Moore's Dig. III, 720-721, and by J. Hubley Ashton, in Moore's Arb. 2702-2703. Sec'y Buchanan regarded the oath of fidelity necessary to obtain the letters as a deprivation of diplomatic protection during the residence in Cuba. Moore's Dig. III, 719. See Machado (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. 2567.

⁵ To become a Presbyterian pastor (Sec'y Fish to Mr. Whiting, March 6, 1873) or a teacher in the public schools (Act'g Sec'y Davis to Mr. Barnett, Aug. 20, 1884) in Canada. Moore's Dig. III, 722.

ship or the renunciation of American citizenship did not amount to an act of expatriation. Even the oath of an American citizen to serve a foreign sovereign faithfully while in his military service may not constitute expatriation, unless the citizen so intends, although it may result in a temporary withdrawal of protection so long as the foreign military service lasts.

In several cases in Hawaii prior to its annexation, the taking of an oath of allegiance to support the constitution and laws of Hawaii and bear true allegiance to the King—which the Hawaiian courts had construed as naturalization, notwithstanding a reservation of original citizenship—was held by Secretaries Gresham, Olney and Sherman as an effective loss of American citizenship.¹ Mr. Olney's ruling leaves some doubt as to whether he may not, in view of the reservation of native allegiance, have regarded American citizenship as merely temporarily lost during the period of foreign residence.² An oath of allegiance forced upon an American citizen will be considered equally as ineffective upon his status as compulsory naturalization.

EXPATRIATION—COMPARATIVE LEGISLATION ³

§ 320. Types of Legislation.

It may not be without interest to make a brief comparative survey

¹ Cases in Hawaii, Moore's Dig. III, 725-729. See also Sec'y Hay in certain cases in Liberia, *ibid.* 730. Secretaries Frelinghuysen and Bayard had held that the oath, involving no renunciation of but expressly reserving American citizenship, and being required merely as a condition for the exercise of local political privileges, could not be construed as an act of expatriation. For. Rel., 1882, 346 and For. Rel., 1888, I, 833, also printed in Moore's Dig. III, 723-725. The oath at best was anomalous in form and intent.

² Mr. Olney, Sec'y of State, to Mr. Willis, November 13, 1895, For. Rel., 1895, II, 867.

³ In the following works on nationality the statutory provisions of the municipal laws of various countries concerning expatriation are printed. Lehr, E., *La nationalité dans les principaux états du globe*, Paris, 1909; Sieber, J., *Das Staatsbürgerrecht im internationalen Verkehr*, Bern, 1907, v. 2; Bisocchi, Carlo, *Acquisto e perdita della nazionalità*, Milano, 1907, ch. 23 (the author in some cases has failed to use the most recent statutes); Cogordan, George, *La nationalité*, Paris, 1890, 2nd ed., pp. 455 *et seq.* (antiquated for many countries); Zeballos, E. S., *La nationalité au point de vue de la législation comparée et du droit privé humain*, Trad. par. A. Bosq., Paris, 1914, 2 v. See also Parl. Pap., Great Britain, v. 89, Cd. 7027, 1893-1894;

of the provisions of municipal law relating to expatriation in the various countries of the world. Reference has already been made¹ to the Report of the Citizenship Board, in which the attitudes of foreign governments on the right of expatriation were found to conform to one of six types, namely: (1) the right of voluntary expatriation is absolutely denied, *e. g.*, Russia and Turkey; (2) expatriation is admitted, and citizenship ceases upon naturalization abroad, the rule in most countries; (3) expatriation is admitted, provided there exists no unperformed military service, *e. g.*, France;² (4) expatriation is admitted, provided citizenship was renounced in the country of origin and in accordance with its forms of law, *e. g.*, Switzerland; (5) expatriation is admitted, and foreign naturalization recognized, but the rights of citizenship revert upon return to the native country, *e. g.*, Venezuela; (6) expatriation is assumed from various acts, long-continued residence abroad, unauthorized performance of military service on behalf of a foreign government, the unauthorized acceptance of public office abroad, and other acts to be mentioned presently.

Report of Citizenship Board, H. Doc. 326, 59th Cong., 2nd sess., Appendix III, Diplomatic papers dealing with the law of particular foreign countries concerning expatriation are printed in Moore's Dig. III, §§ 441-465. Since the publication of these works the following important countries have enacted new legislation concerning nationality. Belgium, law of June 8, 1909, Suppl. to 4 A. J. I. L. (1910), 417-420; Glesner, F., *Commentaire de la loi*, Namur, 1913; Italy, law of June 13, 1912, text, Parl. Pap. Cd. 6526, Misc. No. 1 (1913), 9 R. D. I. Privé, 944 *et seq.*, Clunet, (1912), 1309; comment, *ibid.* 1346-1347; Germany, law of July 22, 1913, Suppl. to 8 A. J. I. L. (1914), 217-227; Article by Richard W. Flournoy, Jr., in 8 A. J. I. L. (1914), 477-486; Meyer, Th., *Reichs- u. Staatsangehörigkeitsgesetz vom 22 juli*, 1913, Berlin, 1913; and extensive commentaries by Cahn and Keller (1914), cited *supra*, p. 591; Laband in 17 *Deutsche Juristen-Zeitung*, March 15, 1912, col. 365; 18 *Nouvelle Rev. prat. de droit int. privé* (1912), 97. Great Britain, law of Aug. 7, 1914, 4 & 5 Geo. 5, ch. 17, to a great extent a recodification of earlier acts, but intended to unify naturalization and British nationality throughout the Empire; E. B. Sargent in No. 3 (July, 1914), *Journ. of the Soc. of Comp. Leg.* 327-336. Venezuela, law of May 24, 1913, *Gaceta oficial*, May 26, 1913, *Jahrbuch d. Völkerrechts*, II, part I, 337. The Haitian law of August 16, 1907, 101 St. Pap. 365 makes practically no change in matters of expatriation, in the previous law. The French government on Nov. 22, 1913 introduced a bill to amend the law of nationality. 9 R. D. I. Privé, 1001. The effect of treaties must always be taken into consideration.

¹ *Supra*, p. 674.

² Mr. Vignaud to Mr. Sherman, Aug. 2, 1897, *For. Rel.*, 1897. 141-144.

§ 321. Modes of Expatriation.

Among the modes of expatriation, naturalization in a foreign country is the one most universally recognized. In some countries, such as Austria-Hungary, Germany and Montenegro, the recognition is conditioned upon obtaining a certificate of manumission obtainable upon complying with certain statutory requirements; in others, such as Russia,¹ Turkey, Persia and Servia, upon written consent of the government, not obtainable on compliance with statutory conditions, but subject to arbitrary refusal; in others, such as the United States,² Germany,³ Nicaragua and Salvador, upon emigration from the country, although this may often be required even when not expressly so provided; in others, such as Switzerland, upon express renunciation in the state of origin of original nationality; and in others, such as Japan, France, and Germany,⁴ upon the preliminary performance of military service. In the Argentine, naturalization abroad results only in the loss of political rights, not citizenship, and in Germany, under certain circumstances, German nationality may be reserved at the time of naturalization abroad.⁵

A second mode of expatriation applies particularly to women, and results from marriage to an alien. This is almost a universal rule, but in some countries, such as France, Belgium, Italy, Honduras, Mexico, Nicaragua, Costa Rica and Venezuela, it is conditioned upon her acquiring the husband's nationality according to his national law; in others, such as Ecuador and Guatemala, upon her leaving the national territory. In Brazil and in some other countries of Latin-America, as well as in Spain, it seems that marriage to an alien does not denationalize a native woman.⁶ In many of the Latin-American countries

¹ See the recent rules of Russian law, reported from St. Petersburg, June 20, 1914.

² Except in the case of married women. *Supra*, § 266.

³ The person must emigrate one year after obtaining the certificate of expatriation, otherwise it is ineffective. Section 24 of law of 1913.

⁴ The certificate of manumission or expatriation being refused. Section 22 of the law of 1913.

⁵ Section 25 of the law of 1913. This provision was intended to cover cases where the enjoyment of certain rights abroad, *e. g.*, the ownership of real estate, depends upon the acquirement of citizenship.

⁶ Octavio Rodriguez in 6 *Rev. de l'Inst. de Dr. Comp.* (1913), 307, cited *supra*, p. 594, note 1; Alvarez, *op. cit.*, 313.

and in several others, including the United States,¹ after dissolution of the marriage, by death or otherwise, the woman's nationality of origin is resumed upon continued residence in or return to the national territory. It may be noted that under certain circumstances, in Japan² and in Brazil,³ the alien marrying a native woman takes her nationality.

Absence from the country for a long-continued period without the manifestation of an intent to return involves expatriation in several countries, such as Austria-Hungary, Bolivia, Bulgaria,⁴ Denmark, Finland, Luxemburg, Norway, Netherlands and Sweden. France up to 1889 recognized this mode of expatriation, and Belgium and Germany have only recently abolished it.⁵ In Spain, it is conditioned upon obtaining foreign naturalization.⁶ The intent not to return is presumed from various acts: In Hungary, Netherlands and the Scandinavian countries, ten years' residence abroad either unauthorized or in the absence of consular matriculation appears to establish the conclusiveness of the presumption. In Austria and Hungary, it requires in addition the failure to respond to a call to arms, although it may be said that many European countries provide for this mode of expatriation even in the absence of prolonged residence abroad. Many publicists are opposed to this mode of expatriation in theory, although they regard the loss of diplomatic protection as proper. Under the law of several countries, such as the United States, Cuba, Honduras and Nicaragua, naturalized citizens give rise to a presumption of expatriation by a return to their native countries for certain periods.

¹ The conditions and limitations have been noted, *supra*, §§ 265, 267.)

² The condition being that she be the owner of a house.

³ Unless he manifests an intention to retain his nationality.

⁴ Youtcheff, N. Y., *La Bulgarie et l'étranger*, Paris, 1892. If he does not heed the *jus avocandi*.

⁵ In Germany, it has been replaced by the provision that a non-resident German liable to military service loses his citizenship at the end of his thirty-first year, if he has not obtained a decision, or postponement thereof, concerning his liability to serve. Section 26 of the law of 1913. On the former rule still prevailing in several countries, see Grabowsky in 12 *Verwaltungsarchiv* (1904), 204-259.

⁶ Several publicists, notably Stoerk, Bluntschli and Fiore consider this the correct rule. *Supra*, p. 678.

Entrance into the military service of a foreign government, or even in some countries, the acceptance of political office, without the preliminary authorization of the government, effects expatriation in a majority of the countries of Latin-America, and in Bulgaria, France, Greece, Portugal, Roumania and Spain. In Europe, the penalty is not often enforced. In some countries, such as Austria-Hungary, Germany¹ and Italy,² expatriation merely results from a failure to retire from the foreign service on demand within a fixed time. The unauthorized acceptance of pensions, decorations or titles from foreign governments effects expatriation in the majority of the Latin-American countries and in Portugal.

In several countries, particularly in some of the Latin-American states,³ loss of citizenship is predicated upon conviction for crime and sentence to an infamous penalty, or upon fraudulent bankruptcy, or upon abandonment of the country in time of danger.⁴ This confuses expatriation with the loss of civic rights. In many of the countries of Europe and in the United States the loss of civic rights follows conviction for certain felonies.

Miscellaneous provisions may be found in a number of states, *e. g.*, expatriation is effected in France and Peru, by the possession of slaves; in Haiti and the Dominican Republic, by services rendered to the enemies of the state, and in other states, by other means.

§ 322. Effect of Husband's and Father's Expatriation upon Wife and Children.

The effect of the expatriation of a husband and father upon the members of his family differs in the various countries. His expatriation extends to his wife and children in Germany,⁵ Great Britain, Japan, Montenegro, Norway, Sweden and Spain, but sometimes only upon condition that they leave the country, as in Hungary, Italy and

¹ Law of 1913, § 28.

² Law of June 13, 1912, art. 8, § 3, 39 *Clunet* (1912), 1311.

³ *E. g.*, Bolivia, Chile, Colombia, Dominican Republic, Haiti, Paraguay, Peru and Uruguay.

⁴ Haiti, Law of August 16, 1907, art. 17, 101 *St. Pap.* 365.

⁵ If named in the certificate of expatriation or manumission. Section 23 of the law of 1913.

Nicaragua, or that, by his naturalization abroad, they acquire his nationality, as in Switzerland. In some countries, as, *e. g.*, in Bulgaria, Brazil and Greece, expatriation has no effect upon the wife and children; in others, their special request for its extension to them is necessary, *e. g.*, in France (the wife), Persia and Portugal (the children, after reaching majority); or the wife may, by express declaration, retain her former nationality, as in Great Britain; or it extends to the wife but not to the minor children, as in Russia, and under certain conditions, in the United States. In some countries, *e. g.*, in Austria, Finland, Germany, Switzerland and Costa Rica, the illegitimate child of a national mother and an alien father, acquires, through the subsequent marriage of his parents by reason of which he is legitimated, the nationality of his father.

§ 323. Repatriation.

There is a certain variation from country to country in the rules concerning repatriation. In some states, such as Austria-Hungary, Finland, Great Britain, Netherlands, the United States and a few Latin-American countries, the expatriated citizen must go through the process of naturalization like any other alien. In Brazil, Venezuela and other countries of Latin-America, the citizen naturalized abroad who resumes his residence in his native country for two years is deemed to have become repatriated.¹ An exception is also made in practically all countries in the case of a married woman, who after the dissolution of her marriage to an alien, wishes to reacquire her original nationality; continued residence in or return to the country, or consular registration usually suffices to effect repatriation. In countries where nationality is lost by the unauthorized entrance into foreign military service or the acceptance of public office abroad, or prolonged absence for a certain period or without the manifestation of an intent to return, the requirements for repatriation are made much easier than in the case of the naturalization of the ordinary alien.

¹ Venezuelan law of May 24, 1913, § 7. Convention signed at Rio Janeiro by various American states, August 13, 1906, ratified by the U. S., Jan. 13, 1908, Treaty series, 575. *Supra*, p. 554.

IMPLIED RENUNCIATION OF CITIZENSHIP

§ 324. True Meaning of the Phrase.

Inasmuch as Congress did not, until 1907, define the acts which could be construed as involving the expatriation of an American citizen, the Department of State in passing upon the validity of claims to American citizenship was compelled to determine in its discretion what acts were to be regarded as evidence of expatriation. Strictly speaking, it is beyond the competence of the executive, without legislative authorization, to declare a citizen to be expatriated, although the extension or withdrawal of diplomatic protection is within executive discretion. When the citizenship of a native citizen, therefore, is declared to have been impliedly renounced, the right to diplomatic protection is generally meant; but in view of the fact that the acts to be mentioned presently have been construed as evidences of expatriation, it has been deemed not improper to consider them under the head of implied renunciation of citizenship.

§ 325. Acts from which Renunciation of Citizenship may be Implied.

Besides formal naturalization abroad, which was always admitted by the political department of the government to have the effect of expatriation, the establishment of a permanent residence abroad, the assumption of the obligations of a subject of a foreign state, or the manifestation of an intent not to return to the United States have at different times been held equivalent to expatriation,¹ although it may be said that frequently the term expatriation was employed merely in the sense of a forfeiture of the right to diplomatic protection.

In certain countries, *e. g.*, Norway, failure to register in a consulate abroad within one year after leaving the country operates as an implied renunciation of citizenship. A similar effect is produced in the United States, under the Act of 1907, by the failure of the non-resident widows of American citizens or native widows of aliens to register their intention to retain or resume American citizenship, and in cases of certain minors, the failure to register implies an election of alienage.²

¹ Moore's Dig. III, § 466, and particularly the opinions of Attorneys-General Black and Williams, there quoted.

² *Supra*, § 271.

(A) EFFECT OF PROLONGED RESIDENCE ABROAD

§ 326. General Principles.

The individual act which most often required executive construction in deciding whether citizenship or protection had been impliedly renounced was prolonged residence abroad. By the Act of March 2, 1907 and the recent rulings of the Department of State, to be considered presently, numerous presumptions and criteria have been established, both in the case of native and of naturalized citizens, by reason of which the determination of the effect of protracted residence abroad upon citizenship and protection has been greatly simplified.

In many state papers it is declared that the establishment of a permanent domicile abroad is to be construed as an act of voluntary expatriation. Aside from the expatriation of an American woman by her marriage to an alien, the statutes of the United States, however, provide for only three modes of expatriation—(1) naturalization in or (2) the taking of an oath of allegiance to a foreign state, and (3) a presumption of expatriation on the part of a naturalized citizen when he resides two years in his native land or five years in any other country.¹ The executive declarations in the case of native citizens, therefore, to the effect that long-continued residence abroad without an intent to return to the United States is equivalent to expatriation must be understood merely as withdrawing from the person so situated one of the most important privileges and incidents of citizenship—the diplomatic protection of the United States.

The anomalous situation which ensues when persons migrate to a foreign country to reside there indefinitely, availing themselves of its resources yet failing to acquire its nationality has been often brought to the attention of this government and of foreign governments. Neither our municipal laws nor international agreements have as yet furnished a satisfactory solution for the difficult questions to which this situation has given rise. Latin-American publicists have with some justice complained of that large class of foreigners who reside permanently in Latin-America, thereby avoiding all the

¹ Act of March 2, 1907, § 2. To the effect that nothing less than expatriation can work a loss of citizenship, see 9 Op. Atty. Gen. 356.

duties of citizenship to their national state and relying upon their alienage to escape civic burdens in the state of residence. These persons often marry abroad, engage in business, and identify themselves almost completely with the people among whom they reside; yet in time of war or revolution or trouble, they assert their alienage, escape military service, war contributions and other civic obligations, and for injuries they may sustain claim indemnities through diplomatic channels.¹

It has already been observed that several countries of Europe consider departure from the country without an intent to return or for ten years as an act of expatriation.² A somewhat anomalous situation therefore confronts the nationals of such countries who, coming to the United States, declare their intention of becoming citizens. Having presumably done all in their power to sever the tie which bound them to their own country, they are nevertheless not yet citizens of the United States. Cockburn emphatically considers that such persons during the probationary period have no claim to the protection of their original nationality.³ The United States in this respect has apparently shared the views of those publicists who apply to nationality the principles of the law of domicile by holding that the old nationality is not put off until the new one is acquired. Nevertheless, as has been noted, the Act of 1907⁴ provided for the extension of a limited right of protection to persons who have declared their intention to become citizens of the United States.⁵

While it is universally admitted that a citizen residing abroad owes what is inaccurately designated as a local or temporary allegiance to the state of residence,⁶ it is also evident that a clear distinction is and should be made between citizens temporarily and citizens permanently resident abroad.⁷

¹ See, e. g., Lisboa, *Les fonctions diplomatiques*, p. 190.

² *Supra*, p. 689.

³ Cockburn, *Nationality*, 202-203. See also Mr. Ashton's argument on citizenship and domicile, before U. S.-Mexican commission of 1868. Moore's *Arb.* 2701.

⁴ Section 1. *Supra*, p. 501.

⁵ Dept. of State rules governing the granting and issuing of passports to such persons, November 14, 1913.

⁶ *Supra*, p. 94.

⁷ Phillimore, II, 6. *Supra*, p. 91. Tunstall's case, in which Mr. Bayard applied

For purposes of discussion, the effect of long-continued residence abroad upon the right to diplomatic protection in the case of native citizens and of naturalized citizens will be considered separately. The general effect of permanent domicil upon the alien's legal position in the state of residence has already been discussed.¹

It may be here said that the Department of State and international commissions have taken the view that it is for the protecting state to determine the effect of long residence abroad upon the right of diplomatic protection. Thus, notwithstanding the fact that by the local law of the state of residence the alien is considered to have acquired citizenship in that state or abandoned his former allegiance, such determination is not binding upon his national state nor will it serve to deprive that state of its right to protect him. Such a result depends upon the will of his home state.²

§ 327. The Case of Native Citizens.

The Department of State's construction of the effect on expatriation of the protracted residence abroad of a native citizen has not always been consistent. Secretary of State Evarts held that continued residence abroad does not amount to expatriation, unless the citizen

the rule of permanent residence to deny the right of Great Britain to protect a British subject permanently resident in the United States. For. Rel., 1885, 459. At least, so far as the use of the local judicial remedies was concerned, Mr. Bayard considered him as identical with a citizen. Asst. Atty. Gen. Hoyt in For. Rel., 1898, 108; Sec'y Seward in case of Panama Riot claims, Naturalization Report, Appendix 64. Webster's earlier view in Thrasher's case to the effect that domiciliation in Cuba deprived Thrasher of his American citizenship and right to protection (S. Ex. Doc. 10, 32nd Cong., 1st sess.) was, on fuller information, subsequently changed. Moore's Dig. III, 719-721, §§ 488-489.

¹ *Supra*, § 40.

² *Lynn (U. S.) v. Spain*, Feb. 12, 1871, Moore's Arb. 2569, 2570. See also as to effect of purchasing real estate in Mexico, cases in Moore's Arb. 2468-2482. This conclusion is only partially shared by Mr. Ashton in his able argument on citizenship and domicil before the U. S.-Mexican commission of 1868. If the local state confers citizenship by reason of domicil, the alien would, said Mr. Ashton, forfeit his original citizenship and right to national protection. Moore's Arb. 2696, 2700. Whatever may be the merits of this view, it does not appear to have the unreserved support of the United States. Mr. Ashton's point was not directly involved in the question then under discussion.

performs acts inconsistent with his American nationality and consistent only with the formal acquirement of another nationality.¹

On the other hand, many secretaries of State construed the effect of residence abroad without an intent to return to the United States as a severance of that mutual relation of protection and allegiance which lies at the foundation of citizenship, and withdrew American protection from citizens so situated.² Secretary Marcy considered such permanent residence abroad as an abandonment of citizenship³ and contended that the rule that trade domicile in time of war confers national character should be extended in time of peace so as to include citizens domiciled abroad.⁴ Secretary Fish in a report of August 25, 1873, expressed an opinion which was adopted by Secretary Hay and Secretary Root as a correct rule:⁵

"When a person *who has attained his majority* removes to another country and settles himself there, he is stamped with the national character of his new domicile; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period, and the presumption of law with respect to residence in a foreign country, especially if it be protracted, is that the party is there *animo manendi*, and it lies upon him to explain it."⁶

These rigorous views have not prevailed. The rule more recently applied is that the mere fact that a native citizen (*i. e.*, a citizen of the United States by birth) resides abroad, no matter for how long a time, is not sufficient of itself to deprive him of the diplomatic protection of the United States. The important fact to determine in each case is whether the citizen has manifested an intention not to return to the United States and assume the duties of citizenship. Upon evidence of this fact, the right of protection is withdrawn.

¹ Mr. Evarts, Sec'y of State, to Mr. Fish, Oct. 19, 1880 (Rau's case), For. Rel., 1880, 960.

² Extracts from instructions of Secretaries Calhoun, Webster, Marcy, Seward, Fish, and others, Moore's Dig. III, 758 *et seq.* It is admitted by publicists that whatever its relation to citizenship, permanent domicile abroad seriously affects the right to diplomatic protection. Phillimore, II, 6; Hall, 277.

³ Mr. Marcy to Mr. Kinney, Feb. 4, 1855, Moore's Dig. III, 759. See also Mr. Calhoun to Mr. Fairchild, Dec. 9, 1844, *ibid.* 758.

⁴ Mr. Marcy to Mr. Clay, May 24, 1855, *ibid.* 760.

⁵ Circular of March 27, 1899 (Hay); Circular of April 19, 1907 (Root).

⁶ Sec'y Fish to the President, Aug. 25, 1873, For. Rel., 1873, II, 1186.

Interest lies then in establishing what is the manifestation of an intent not to return to the United States and perform the duties of citizenship. Long continued residence and the absence of any indication of intention to return,¹ or in addition, engaging in business abroad, marrying there, and identification with the country of residence,² or the purchase and cultivation of land abroad³ raise a presumption that a citizen has practically abandoned his allegiance to his native country and with it the right to claim protection from the government from which he has alienated himself and withheld his support.⁴

Besides prolonged residence abroad, the failure to contribute to the support of the government by the payment of taxes was in Secretary Fish's administration made an important criterion in determining whether a citizen had abandoned his right to American protection.⁵ But this test, like the property test, is not and has never been a good one. Under a recent ruling of the Department of State, evidence of the payment of the income tax under the Act of October 3, 1913, will not alone overcome a presumption of expatriation which may have arisen, although it will be considered in connection with other evidence in determining the question of intent to return to this country or the right to the continued protection of the United States.⁶

The fact that the American owner of a registered vessel resides abroad has been held to suspend the benefit of American registry during such foreign residence.⁷ The same suspension of the privileges

¹ Hepburn's case, residence of 35 years in Haiti; Allen's case, residence of 56 years in Haiti; Robinson's case, residence of 38 years in Mexico; Rulings of Sec'y of State Fish, Moore's Dig. III, 761-762; Robinson, however, appeared before international commissions as an American citizen, Moore's Arb. 3038, 3410; 33 years' residence in Scotland, Sec'y Olney to Mr. Bendit, Moore's Dig. III, 766.

² Morris' case, Mr. Gresham to Mr. Smith, Sept. 1, 1893, Moore's Dig. III, 765; Webster, P., Citizenship, 169, 303; Sec'y Bayard to Min. to Switzerland, Oct. 12, 1887, For. Rel., 1887, 1073.

³ Sec'y Fish to Mr. Williamson, March 16, 1875, Moore's Dig. III, 765; Burt's case, Sec'y Fish to Mr. Hackett, June 12, 1873, *ibid.* 774. (It was later shown that Mr. Burt's absence was due to reasons of health.) The *Venus*, 8 Cranch, 253, 281.

⁴ Mr. Bayard to Sec'y of State Gresham, For. Rel., 1893, 327-328; Sec'y of State Hay to Mr. Porter, Jan. 17, 1902, For. Rel., 1902, 407-408; American Passport, 210.

⁵ Quotations from Sec'y Fish's instructions in Webster, P., *op. cit.*, 165-166.

⁶ Circular March 18, 1914 and *infra*, p. 706.

⁷ Wirt, Atty. Gen. (1821), in 1 Op. Atty. Gen. 523.

of American registry has been held to follow the employment of an American vessel in foreign coastwise trade. Where the owner of such a vessel was domiciled in a country which by special license extended the privileges of its coastwise trade to the vessel, Secretary of State Seward held that the protection of the United States during such employment was waived.¹

§ 328. Practice under the Amended Rules of 1907 and the Circular Instruction of July 26, 1910.

The recent statute of 1907 and the rules of the Department of State issued thereunder, particularly regarding the registration of American citizens resident abroad,² have vastly increased the number of cases in which the Department has been required to pass upon the effect of residence abroad upon the right to protection. The same general principles govern applications for registration and for passports. In the circular governing registration it is provided that the certificate of registration shall not be issued unless "it is clearly shown that the residence abroad has not assumed a permanent character." In paragraph 4 of the rules governing the granting and issuing of passports,³ it is still provided that the applicant must not only state that he intends to return to this country, but within what length of time, although this latter requirement does not appear ever to have been rigidly enforced. How long the applicant could remain abroad without losing his right to receive a passport depended, until very recently, upon his intention of returning, which was determined by the circumstances of his business and social relations. But if his absence was to be permanent, he forfeited his right to receive a passport.⁴

¹ Mr. Seward, Sec'y of State, to Mr. Sullivan, July 16, 1867, Dipl. Cor., 1868, II, 1016, Dec. 4, 1867, Moore's Dig. II, 1072. Yet when this case subsequently went to arbitration (the *Montijo*, (U. S.) v. Colombia, Aug. 17, 1874, Moore's Arb. 1421) the Umpire held that the claimants were not domiciled in Colombia, and added (as *dictum*) that even if so domiciled, the "United States would still have the right, under certain circumstances, to extend to them its protection."

² Act of March 2, 1907, §§ 3, 4, 6, 7; Consular Regulations, § 172, as amended, Circular Instruction, Expatriation, April 19, 1907, For. Rel., 1907, 3.

³ Issued by President Wilson, January 12, 1915.

⁴ The American passport, 203. For a time between 1908 and 1910 the Department required native citizens who resided in a foreign country over ten years to submit

In the circular instruction of March 27, 1899, entitled "Passports for persons residing or sojourning abroad" it is stated that "a condition precedent to the granting of a passport is . . . that the citizenship of the applicant and his domicil in the United States and intention to return to it with the purpose of residing and performing the duties of citizenship shall be satisfactorily established.¹ . . . Even where expatriation may not be established, a person who is permanently resident and domiciled outside of the United States cannot receive a passport."

After carefully considering the principles underlying the whole question of the protection of citizens abroad, the Department of State in 1910 came to the conclusion that in the case of a native American residing in a foreign country, a definite intention to resume residence in this country should not be made an absolute prerequisite to the privilege of receiving a passport or certificate of registration, or if necessary, protection by the United States. The new ruling of the Department is embodied in a circular instruction of July 26, 1910, to Diplomatic and Consular Officers, entitled "Protection of native Americans residing abroad," which may, with advantage, be quoted in part:

"In modern times there has been a vast improvement in facilities for communication and transportation between the various nations of the earth, and a corresponding increase in international travel and trade, and it has become a not unusual practice for citizens of one country to establish themselves in another country for purposes of business, without any intention of renouncing their original allegiance. Therefore, it is the Department's opinion that the acquisition of permanent foreign residence by a native citizen has not the same significance which it had in former years. It is considered that an American citizen may now have a permanent foreign residence and yet contribute, indirectly if not directly, to the wealth and strength, the prestige and general welfare of his country, so that as long as he maintains a true allegiance to this Government and is ready, if need be, to come to its defense, he may be entitled to its protection.

sworn statements as to the cause of such residence, their ties of family and property within this country, and their intention to return to the United States for permanent residence.

¹ The exceptions to the rule governing loss of protection by residence abroad will be considered *infra*. See the instruction of Secretary Bayard to Mr. Winchester, Minister to Switzerland, October 12, 1887, For. Rel., 1887, 1073-1074.

"In each case of an American permanently residing abroad it will be necessary, before deciding as to his right to protection, to determine among other things whether he maintains an actual connection with the United States and a true allegiance thereto, or whether he has practically abandoned this country and identified himself with the political community of the land in which he resides; and while, as to questions arising in regard to registration and the issuance of passports, a lack of intention to resume residence in this country may, upon matters relating to protection as American citizens, still raise a presumption of expatriation, such presumption shall not be considered as conclusive, but the person concerned shall be given an opportunity to show that he is still a true citizen of the United States. In this connection are to be considered the cause of the foreign residence, participation in the politics of the country of residence or abstention therefrom, ties of family, business, or property maintained with this country, and, in the case of a married man, the original nationality of the wife and the mode of raising the children, and, finally, the general conduct of the person in question. It is impossible to lay down a general rule which will be applicable to every case which arises, and each case must be decided upon its peculiar merits. You will, therefore, not finally refuse a passport or registration certificate to any person belonging to the class under consideration until you shall have been authorized to do so by the Department after a full presentation of the pertinent facts."

The purpose of the circular is to furnish tests and criteria by which the great and important question, namely, whether the citizen by birth still feels and bears true allegiance to the United States, may be determined.

The payment of the income tax under the Act of October 3, 1913, will also "be duly considered in deciding the question of the right to the continued protection of this government in cases of native citizens who have resided abroad for a period so long that the natural presumption may be held to have arisen that they have abandoned this country."¹

While these rulings modify the former rigid rule that passports and registration were to be refused to Americans who were "permanently resident and domiciled outside of the United States," the Department will probably continue, under the rulings, to decline to extend these evidences of citizenship and protection to that considerable class of renegade Americans established in foreign countries, especially in Latin-America, who have no loyalty for the United States,

¹ Circular instruction "Payment of the income tax," etc., March 18, 1914.

who fail to contribute in any way to its welfare, who meddle in the politics of the countries in which they live, never approaching our diplomatic or consular representatives until they get into trouble, and who, far from increasing the prestige of the United States abroad, merely serve to bring this country into bad odor with foreign governments.

It has already been observed ¹ that under a uniform rule of the Department, given statutory sanction by the Act of March 2, 1907, a passport and protection are denied to the native citizen who leaves this country at an early age and continues to reside abroad after attaining majority without electing American citizenship.

§ 329. Decisions of International Tribunals of Arbitration.

The decisions of arbitral commissions have been practically uniform in concluding that domicile or residence in a foreign country does not denationalize, unless there be a distinct law to that effect either in the claimant or defendant country. Some brilliant arguments have been made ² to show that in an international sense the term "citizens" embodied in a protocol of arbitration, was not to be taken in its strict meaning in municipal law as denoting paramount allegiance to a sovereign, but in a so-called larger sense which embraced persons who by permanent domicile were within the protection of the government under which they resided. Such an argument, it is believed, is founded upon a failure to draw a distinction between belligerent domicile or trade domicile in time of war, in which the person's rights and liabilities flow from his domicile, and ordinary civil domicile in time of peace. It has already been observed ³ that international commissions have frequently considered belligerent domicile as conferring national character under the terms of protocols of arbitration and as a principle of international law, but in the absence of an express agreement it has been the general rule of international commissions, so far as relates

¹ *Supra*, p. 584, particularly Mr. Olney, Sec'y of State, to Mr. von Reichenau, November 20, 1896, For. Rel., 1897, 182.

² See, *e. g.*, Hale's and Hoar's arguments before British-American Commission under protocol of May 8, 1871, paraphrased in Moore's Arb. 2722-2725, and in Hale's Report, 11-13.

³ *Supra*, § 246.

to the question of jurisdiction, to consider the national character of the party to be determined by his paramount allegiance, irrespective of the fact of domicil.¹

The few decisions of arbitral commissions which have predicated a loss of citizenship or protection upon long-continued residence abroad were based either upon the law of the claimant country according to which such a result followed long residence abroad, or upon exceptional grounds.² The British-American Commission of 1853 had in a number of cases, *e. g.*, Laurent and Uhde, considered that the domicil in Mexico of British subjects conferred upon them Mexican citizenship and deprived them of standing as British subjects.³ This view

¹ Belcher (U. S.) *v.* Costa Rica, July 2, 1860, Moore's Arb. 2695; Fretz (U. S.) *v.* Colombia, Feb. 10, 1864 (decision of Sir Frederick Bruce, umpire, Moore's Arb. 2560; Miller (U. S.) *v.* Mexico, July 4, 1868, *ibid.* 2706 (see the able argument of J. Hubley Ashton, *ibid.* 2696-2706); Eigendorff, *ibid.* 2717 (temporary absence); Bowen, *ibid.* 2482; Elliott, *ibid.* 2481 and cases cited 2482 (long residence and purchase of real estate in Mexico did not forfeit American citizenship or protection). See also *supra*, p. 492; "Carta de seguridad" as Chilean involved no forfeiture of American citizenship; Pradel (U. S.) *v.* Mexico, *ibid.* 2543. See also Robinson, *ibid.* 3410 (38 years' residence in Mexico); Wilkinson, *ibid.* 2720; Barclay (Gt. Brit.) *v.* U. S., May 8, 1871, Moore's Arb. 2721, 2727, Hale's Rep. 11-14; Crutchett, *ibid.*, Hale's Rep. 14; Lynn (U. S.) *v.* Spain, Feb. 12, 1871, Moore's Arb. 2569-2570 (48 years' residence in Cuba, acquisition of real estate and marriage there); Machado (U. S.) *v.* Spain, *ibid.* 2567 (*carta de domicilio* in Cuba held not to deprive claimant of right to appear before commission as American citizen); Portuondo, *ibid.* 2565 (no proof of intention to abandon U. S. or renounce U. S. citizenship); San Pedro, *ibid.* 2568; Montijo (U. S.) *v.* Colombia, Aug. 17, 1874, Moore's Arb. 1421; La Fontaine, 210, 212 (citizenship not lost by domicil abroad "in cases of flagrant violation of justice," and U. S. presentation of claim held proof that U. S. considered claimants citizens). See also Moore's Dig. II, 1072. Perrenin (France) *v.* U. S., Jan. 15, 1880, Moore's Arb. 2572-2574, Boutwell's Rep. 103 (notwithstanding Art. 17 of French Civil Code by which claimant had lost his French citizenship through long residence in U. S. without intention to return to France, commission admitted him as French citizen, inasmuch as he had not acquired U. S. citizenship. Perhaps the decision is explainable on the ground that it was not absolutely certain that the claimant was without intent to return to France). See Lebreton (France) *v.* U. S., Boutwell's Rep. 105; Faber (Germany) *v.* Venezuela, Feb. 13, 1903, Ralston, 630.

² In Thompson (U. S.) *v.* Mexico, Act of March 3, 1849, Moore's Arb. 2668, residence plus the acquisition of real estate which involved an oath of allegiance to Texas, plus expressed intention to become citizen of Mexico deprived claimant of title to American protection.

³ *Supra*, p. 562. These decisions, however, merely held that belligerent domicil

was supported by Mexico in a number of cases before the 1868 Commission between the United States and Mexico to bar claims of American citizens domiciled in Mexico. Wadsworth, American Commissioner, wrongly interpreting the Koszta case, was inclined to agree with the argument that domicile fixed the national character.¹ Mr. Ashton, counsel for the United States, however, in an able argument, drew a clear distinction between nationality and domicile,² after which Commissioner Wadsworth appears to have modified his views. While Umpire Lieber held that foreign domicile could not denationalize, unless so provided by the municipal law of the native or adopted country,³ the Commission nevertheless held that the foreign domicile of a naturalized citizen without intent to return to the United States,⁴ or departure and establishment of domicile abroad after the filing of a declaration of intention⁵ involved an abandonment of all claim to American protection. After a number of decisions in which domicile plus a declaration of intention were held to confer nationality,⁶ Sir Edward Thornton, as second Umpire of the Commission, put an end to the uncertain and unsatisfactory decisions on this matter by acting upon the principle that the term "citizens" in the convention meant citizenship according to the law of the contracting parties, and declined to recognize a declaration of intention or domicile, singly or together, as conferring citizenship.⁷

The British-American Commission of 1871, dismissed the claim of a person born in the United States, who, after three years' residence

conferred the nationality of the place of domicile for determining war damages and in the matter of trade.

¹ Schaben (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2696.

² *Ibid.*, 2696-2706. *Supra*, § 252.

³ Miller (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2706.

⁴ Perez (U. S.) v. Mexico, *ibid.* 2718. See also Halsey (U. S.) v. Mexico, No. 449, not in Moore (absence from U. S. for 26 years, *dictum*), Biencourt, *ibid.* 2483 (*dictum*).

⁵ Kern (U. S.) v. Mexico, *ibid.* 2719 and cases cited 2720.

⁶ Jarr and Hurst (U. S.) v. Mexico, *ibid.* 2707 *et seq.* But it was not held to confer nationality when not followed by naturalization. Kern, *ibid.* 2719. See also *supra*, p. 575.

⁷ Wilkinson (U. S.) v. Mexico, *ibid.* 2720. Zamacona, Mexican Commissioner, seems also to have acted on that principle.

in Great Britain, secured British naturalization, leaving immediately thereafter for the United States.¹

The Spanish-American Claims Commission of 1871 held that departure from the United States without any intent to return is to be construed as an act of expatriation.²

The French-American Commission under the protocol of January 15, 1880, held in a number of cases that in accordance with the French Civil Code the establishment of a residence in the United States without intent to return to France forfeited the right of the claimant to appear before the commission as a citizen of France.³

§ 330. Case of Naturalized Citizens.

In our discussion of the status of naturalized citizens,⁴ it has been observed that citizenship acquired by naturalization may be more easily lost by residence abroad than citizenship acquired by birth. The tie which binds the naturalized citizen to his adopted country has always been recognized as more easily dissoluble than that which binds the native citizen to his country. While in the case of native as well as naturalized citizens, proof of residence abroad without intent to return to the United States was regarded, prior to 1907, as evidence of expatriation and involved a forfeiture of the right of American protection, the tests and criteria by which the absence of intent to return was determined were much more strictly construed and were more unfavorable to expatriation in the case of the native than in that of the naturalized citizen. Thus, a comparatively short period of residence abroad on the part of a naturalized citizen raised a presumption of abandonment of his American citizenship.

¹ *Boyd (Gt. Brit.) v. U. S.*, May 8, 1871, *ibid.* 2465. But the principal ground of decision appears to have been that by U. S. law he was an American citizen, and could not claim internationally against the United States. *Supra*, p. 588.

² *Lavigne*, No. 11, and *Bister*, No. 21, also *Marrot*, No. 114, *Moore's Arb.* 2565; *Price (U. S.) v. Spain*, *ibid.* 2565 (naturalized citizen settled abroad permanently immediately after naturalization).

³ *Lebret (France) v. U. S.*, *Moore's Arb.* 2492, 2505, *Boutwell's Rep.* 105 (*dictum*). *Mrs. Lebret* resided 45 years in U. S. *Bouillotte*, *ibid.* 2562 (34 years' residence in U. S. and permanent establishment construed as intention not to return). *Deucatte*, *ibid.* 2582 (declaration of intention to become U. S. citizen plus long residence in U. S. held to forfeit French citizenship under French law).

⁴ *Supra*, § 241.

A further distinction is to be noted between naturalized citizens returning to their native countries and those proceeding to reside in third countries. The practice of the United States, as manifested in its statutes, treaties and diplomatic correspondence, has always recognized that the presumption of expatriation and of the intent to reside abroad permanently is much stronger in the case of a return to the country of origin than in the case of residence in a third country.¹ In the bill from which the Act of July 27, 1868 was evolved, one section provided that continuous residence of five years in his native country on the part of a naturalized citizen shall be construed as a permanent domicil there and a forfeiture of the right to protection.² In practically all of the naturalization treaties concluded by the United States, the reestablishment of residence in the native country with the intent not to return is equivalent to a renunciation of American citizenship, and two years' residence may be regarded as evidence of such intent.³

The Act of March 2, 1907, maintains the recognized distinction between naturalized citizens returning to their native or to a third country by providing that "when any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years."⁴ Unless the presumption of renunciation of citizenship is rebutted by showing some special and temporary reason for the change of residence, the obligation of protection by the United States is deemed to be ended. While the statute may be open to the criticism that it enlarges the class of persons without any nationality, inasmuch as it withdraws American

¹ Mr. Fish, Sec'y of State, to Mr. Wing, Apr. 6, 1871, Moore's Dig. III, 737; Mr. Fish to Mr. Washburne, June 28, 1873, For. Rel., 1873, I, 260; Mr. Adee, Act'g Sec'y of State, to Mr. Little, July 13, 1895, For. Rel., 1895, II, 937; The American passport, 138.

² The section was ultimately dropped from the bill. Its legislative history is set forth in Sen. Doc. 326, 59th Cong., 2nd sess., 24-25.

³ *Supra*, § 241.

⁴ Section 2 of the Act. This provision applies as well to the natives of countries in which the U. S. exercises extraterritoriality. The statute is not retroactive. Department of State circular instruction, July 21, 1910, For. Rel. 1901, 1.

citizenship regardless of the acquirement of any other citizenship,¹ it has nevertheless been of great aid to the Department of State in determining when protection may properly be withdrawn from naturalized citizens residing abroad.

If it is shown that the residence abroad, whether in the native or in a third country, has, at any time within five years of the date of naturalization, become permanent, American protection may be withdrawn, and § 15 of the Act of June 29, 1906, authorizes the Department of Justice to bring proceedings for the cancellation of certificates of naturalization upon proof that the naturalized citizen has established a permanent residence abroad.

(B) METHODS OF OVERCOMING PRESUMPTION OF EXPATRIATION

The presumption of expatriation resulting from residence abroad may be overcome by showing that it is consistent with a valid claim to American citizenship, and the Act of 1907 provides that the presumption may be overcome "on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe." These rules and regulations are contained in the circular instruction of April 19, 1907² and subsequent amendments thereof.³ The circular instruction states that "the evidence required to overcome the presumption must be of the specific facts and circumstances" which bring the alleged citizen under one of the heads⁴ exempting him from the presumption of expatriation "and mere assertions, even under oath, that any of the enumerated reasons exist will not be accepted

¹ The Pan-American conference at Rio Janeiro in 1906, in its convention on the status of naturalized citizens (ratified by the U. S. Jan. 13, 1908, Treaty Series, 575) has overcome this difficulty by providing in effect that the two years' residence in the native state shall be construed, subject to rebuttal, as a recovery of original nationality as well as a loss of adopted citizenship. (*Supra*, p. 554.)

² Expatriation, For. Rel., 1907, 3. See also circular, Applications for Registration, March 2, 1908.

³ In the circular of July 26, 1910, various criteria are mentioned for overcoming the presumption of expatriation by the long residence abroad of a native citizen of the United States. *Supra*, p. 696. The rules now mentioned, while laid down primarily with reference to naturalized citizens, apply equally to native citizens.

⁴ To be named presently.

as sufficient." In the circular instruction of March 2, 1908, concerning the registration of citizens in consulates abroad, it is provided that "whenever an applicant against whom the presumption of expatriation lies submits evidence to overcome the presumption, this evidence must be in the form of an affidavit . . . , " a form for which was prepared by the Department. The consular officer was empowered, in his discretion, to require corroborative evidence, if deemed necessary.

§ 331. Interpretation and Construction of Departmental Rules.

1. The most important factor which will serve to overcome the presumption of expatriation is proof that the residence abroad is in representation of American business or commerce, and that the citizen intends eventually to return to the United States permanently to reside.¹ This was a rule of the Department from an early period,² and the first rule prescribed by the Department under the provisions of the Act of 1907 was that the party could overcome the presumption by showing that he resided in the foreign country *solely* as a representative of American trade and commerce.³ Subsequently the rule was enlarged to include a person *principally* engaged as a representative of such trade.⁴ The Solicitor's Office deemed it advisable to still further enlarge the scope of this rule, with respect to naturalized citizens residing in countries contiguous to the United States, to include those engaged in *substantial* trade or commerce between the United States and such countries. In a circular instruction issued February 28, 1913, the Department prescribed a special and more liberal rule in the case of naturalized citizens residing in countries near to the United States for reasons and in a manner not inconsistent with the retention of American citizenship and protection. This rule reads:

"(*Special rule a*) In the case of a naturalized American citizen residing in Canada, Mexico, the West Indies, Central America or Panama, the presumption of expatriation may be overcome upon his presenting to a

¹ Rule (a) of the Circular instruction, Expatriation, April 19, 1907, For. Rel., 1907, 4.

² See instructions printed in Moore's Dig. III, § 476. Van Dyne, Naturalization, 355.

³ See rule (a) of Circular instruction, April 19, 1907, For. Rel., 1907, 4.

⁴ Circular of May 14, 1908, Amendment to rule (a) to overcome the presumption of expatriation.

diplomatic or consular officer satisfactory evidence that he is employed by a legitimate corporation or company or principally engaged in any legitimate concern, which is effectively owned and controlled by a citizen or citizens of the United States and materially promotes the interests of this country, and that he intends to return to the United States to reside."

Settlement in business by a naturalized citizen on his own account and not as a representative of American trade and commerce leads to the belief that the residence abroad is permanent and will not serve to overcome the presumption of expatriation.

2. The rule that persons who take up an apparently permanent residence abroad are not entitled to diplomatic protection, does not apply to persons who go abroad for reasons of health and remain abroad many years, hoping to come back, yet prevented from doing so by continuing illness.¹ This rule of the Department, with the addition of the principle that residence abroad for purposes of education does not effect a change of domicil, was adopted as the second rule to overcome the presumption of expatriation under the Act of 1907.²

3. The third factor which may overcome the presumption is "that some unforeseen and controlling exigency beyond his power to foresee has prevented his carrying out a *bona fide* intention to return to the United States within the time limited by law, and that it is his intention to return and reside in the United States immediately upon the removal of the preventing cause."³

4. In view of the opinion of the Attorney General in Gossin's case⁴ to the effect that the presumption of expatriation by two years' residence in the native country was created to relieve the Department from protecting persons without a *bona fide* intention to reside in the

¹ Partial paraphrase by Mr. Moore of an instruction of Sec'y Bayard, Oct. 12, 1887, For. Rel., 1887, 1073, Moore's Dig. III, 775. See also Dupuy v. Wurtz, 53 N. Y. 556, to effect that residence abroad for reasons of health does not constitute change of domicil. Beattie v. Johnson, 10 Cl. and Fin. 139 (*dictum* of Lord Campbell); Burt's case, Moore's Dig. III, § 477; Strahlheim's case, Sec'y Hay to Mr. Hardy, May 20, 1902, For. Rel., 1902, 975.

² The clause reads: "That his residence abroad is in good faith for reasons of health or for education, and that he intends eventually to return to the United States to reside." Rule (b) of Circular instruction of April 19, 1907, For. Rel., 1907, 4.

³ Rule (c), *ibid.*

⁴ 28 Op. Atty. Gen. 504. Circular instruction, Dec. 22, 1910, For. Rel., 1910, 3, 421.

United States, and is overcome by an actual return to the United States, the Department, in a circular instruction of November 18, 1911, permitted the naturalized citizen to prove "that he has made definite arrangements to return immediately to the United States for permanent residence" as an additional method of overcoming the presumption of expatriation. In this connection, it is prescribed, that "the disposition of his property and effects, the arrangements in regard to his family, if he has one, and the steps taken to obtain passage to the United States are to be considered."

It will be recalled that during the administration of Secretary Fish and his immediate successors the payment of the income and excise taxes imposed on American citizens or the possession of property in this country were made tests in determining the intent to retain American citizenship.¹ The question having been raised whether a naturalized citizen against whom the presumption of expatriation had arisen could overcome the presumption by showing that he had paid or was ready to pay the income tax provided for by the Act of October 3, 1913, the Department, in a Circular instruction of March 18, 1914, held that such a rule had not been prescribed, but added that "if a person against whom the presumption . . . has arisen presents . . . evidence that he has paid the income tax, this fact will receive due consideration in connection with other evidence submitted to overcome the presumption of expatriation under the established rules, and particularly with regard to the question of intent to return to this country to reside." In like manner, the circular instruction of February 28, 1913 which applies only to Canada, Central America, Mexico, Panama and the West Indies, provides that if a person against whom the presumption has arisen shows "that he has retained in good faith in this country a residential house or other property, such fact, although not of itself decisive, should be given due weight in determining his status, and particularly the question of his intention of returning to the United States to reside."

§ 332. Rules in the Case of Extraterritorial Countries.

The peculiar position of American citizens in Turkey and China

¹ See, *e. g.*, Mr. Fish, Sec'y of State, to Mr. McVeagh, Dec. 13, 1870, For. Rel., 1871, pp. 887, 888.

and the fact that so many American missionaries are resident in those dominions, brought about an extension of the rules by which the presumption of expatriation by residence in Turkey or China could be overcome.

In the case of both countries, proof that the citizen resides there as a regularly appointed missionary of a recognized American church organization is sufficient to overcome the presumption of expatriation.¹

In Turkey, in addition, the citizen may show that prior to March 2, 1907, he had established himself in a distinctively American community, whether or not it was formally recognized as such by the Ottoman government, that he is still residing therein, and that it has been and still is impracticable for him to return to this country to reside.²

In China, the citizen may show that he is regularly employed in an enterprise having for its object the development or advancement of the people and in no wise inconsistent with American interests, or else that he resides in China in the employ of the Chinese Government in a capacity not inconsistent with his American citizenship, and calculated to advance legitimate American interests, commercial or otherwise.³ In either case, he must show that he intends eventually to return to the United States to reside.

It will have been observed that the doctrine of implied renunciation of citizenship by continuous residence in a foreign country applies only with certain limitations to countries in which the United States exercises extraterritorial rights.

Naturalized citizens, natives of these countries, lose their citizenship by returning to them to reside permanently and a residence of

¹ Rule (d) of Circular instruction, Dec. 11, 1907 (Turkey), and rule (e) of Circular instruction May 13, 1908 (China), For. Rel., 1908, 1. This rule in fact applies to missionaries everywhere, provided they do not intend to relinquish American citizenship. Mr. Everett to Mr. Marsh, Feb. 5, 1853, 2 Wharton, 360; Mr. Gresham to Mr. Runyon, November 1, 1894, American passport, 209.

² Rule (c) of circular of Dec. 11, 1907 as supplemented by rule (e) embodied in instruction of Mr. Knox, Sec'y of State, to W. Stanley Hollis, American Consul General at Beirut, Dec. 16, 1912. Rule (e) has no application to persons who were formerly Turkish subjects or to those who settled in Turkey after March 2, 1907. This question of residence in countries in which the U. S. exercises extraterritoriality will be further discussed presently.

³ Rules (c) and (d) of circular instruction of May 13, 1908.

two years, under the Act of 1907, creates a presumption that they have ceased to be American citizens. But in the case of native American citizens or naturalized citizens of other origin than that of the countries in question, a different rule prevails.

In a series of instructions issued in 1887 and 1888, while Mr. Bayard was Secretary of State,¹ the Department of State laid down the rule that citizens of the United States not natives of these countries, could not by mere continuous residence there lose their domicile or citizenship in the United States, since they could not, without grave peril to their safety, become subjects of the native government.² Notwithstanding their indefinitely prolonged residence, protection was extended to them so long as their pursuits were legitimate and not prejudicial to the friendly relations of the United States with the government in whose territory they were residing. In a recent case,³ the United States court for China held that notwithstanding a residence of forty-seven years in China, without an intention to return to the United States,

"There is nothing in the theory or practical operation of the law of extraterritoriality inconsistent with or repugnant to the application of the American law of domicile to American citizens residing in countries with which the United States has treaties of extraterritoriality."⁴

The American citizen, with the exception noted, who is resident in such an extraterritorial country, need not, as a rule, in order to retain his American citizenship, domicile and right to protection, manifest an intention to return to the United States. On the contrary,

¹ These instructions are to be found in For. Rel., 1887, 1094, and 1120-1125 and in Moore's Dig. III, 288. See also, on this question, Sen. Doc. 326, 59th Cong., 2nd sess., 210-213, and Hineley, *op. cit.*, 90-91. See also Moore's Dig. III, § 478.

² Circular of March 27, 1899, last paragraph.

³ Young J. Allen case, 1 A. J. I. L. (1907), 1029, 1039.

⁴ Judge Wilfey held that Dr. Allen had acquired an extraterritorial domicile in China, and that the law which Congress has extended to Americans in China, namely, the common law, applied in the distribution of his estate, and not the law of the state (Georgia) in which he had his domicile of origin. The decision appears to have been based largely upon Sir Francis Piggott's reasoning in his work on Extraterritoriality (Rev. ed., 1907), 217, 225, 230-233, and upon the views of Hall, Foreign jurisdiction, 184-186. The exception from the general rule is based upon the theory that the person has maintained his identity as an American citizen, and is connected with an American community, recognized as such by the local government.

the ruling of the Department of State expressly contemplates a permanent residence in the extraterritorial country.¹

The most important matter connected with permanent residence in American communities in countries in which the United States exercises extraterritoriality was that, up to 1914, American citizenship was inheritable from generation to generation, so long as the descendants of the American citizen formed part of such a distinctive American community, regardless of their intention to assume a residence in the United States. This important exception to § 1993 of the Revised Statutes, which provides that "the rights of citizenship shall not descend to children whose fathers never resided in the United States," was based upon the ground that "such descendants are to be regarded, through their inherited extraterritorial rights . . . as born and continuing in the jurisdiction of the United States."² But the exception to § 1993 was not extended to the descendants of naturalized foreigners who return to the country of their origin, although their country may be one in which the United States exercises extraterritoriality.³

§ 333. Recent Departmental Ruling Concerning Heritability of Citizenship in Extraterritorial American Communities.

It has recently been considered by the Department of State that in view of certain decisions of the Supreme Court limiting the term "United States" to the continental part of the United States,⁴ and a ruling that residence in the Philippines is not counted as residence

¹ The ruling covered American communities in Turkey only, but probably extends to other extraterritorial countries. It reads: "Persons who are members in Turkey of a community of citizens of the United States of the character above described do not lose their domicile of origin no matter how long they remain in Turkey, provided that they remain as citizens of the United States, availing themselves of the extraterritorial rights given by Turkey to such communities, and not merging themselves in any way in Turkish domicile or nationality." For. Rel., 1887, 1125. See as to presumption of expatriation on the part of native American citizens, Circular instruction of July 26, 1910, *supra*, p. 696.

² The ruling was made in a case in Turkey, For. Rel., 1887, 1125. Circular instruction, March 27, 1899.

³ Mr. Rives, Asst. Sec'y of State, to Mr. Emmet, Jan. 11, 1888, Moore's Dig. III, 288.

⁴ *Downes v. Bidwell* (1901), 182 U. S. 244.

in the United States for purposes of naturalization, the instructions of 1887 which held residence in American communities in Turkey to be a perpetual title to American citizenship, must be overruled, for they were deemed to rest upon the fiction that persons born to American citizens residing in American communities in Turkey are born to persons residing within the territory and jurisdiction of the United States.¹ This new ruling of the Department does away with the exception, made since 1887, to § 1993 of the Revised Statutes, and makes that section of universal application.

BANISHMENT

§ 334. Now Practically Abandoned.

In former times, exile or banishment was frequently practiced. It is now considered inconsistent with the nature of a sovereign state and opposed to the basis of the modern political system, inasmuch as this form of penalty depends for its execution upon the goodwill of neighboring states. Moreover, it may under certain circumstances be incapable of execution, for the original home state is bound to receive back its citizens if no foreign state will accept them, on account of indigence, disease, or other cause. This is one of the distinguishing marks of the bond of nationality, as has been observed. For this same reason, several leading publicists are opposed to the imposition of denationalization as a penalty for long-continued residence abroad, for entering foreign military service, for the ownership of slaves and for other acts, when no new nationality is acquired by the individual. The loss of diplomatic protection they consider to be a more logical penalty.²

It must be remembered that the penalty of loss of citizenship pro-

¹ Special Consular Inst. 340, July 27, 1914, Citizenship of children born of American fathers who have never resided in the United States. Including Opinion of the Solicitor, June 22, 1914. Ruling made on the application for a passport of Ben Zion Lilienthal, grandson of a naturalized citizen of the U. S. and resident, as was his father (son of the naturalized citizen) in a Zionist community in Turkey.

² Bar, § 55; Cogordan, *op. cit.*, 2nd ed., 285-287; Stoerk in R. G. D. I. P., 1895, 287; Bluntschli, art. 372. See Dr. Sturm in 17 Deutsche Juristen-Zeitung, Feb. 15, 1912, col. 278.

vided for in the penal codes of many of the Latin-American states has reference merely to the loss of civic rights.

ACTS WHICH DO NOT EFFECT EXPATRIATION

§ 335. Foreign Military Service.

It has been held almost uniformly that entrance into the military service of a foreign government, unless accompanied by an unqualified oath of allegiance, does not effect expatriation.¹ Certain decisions of the domestic commission of 1849 which penalized service in Mexico with a loss of American citizenship must be understood at most in the sense of a *temporary* disqualification of any claim to American citizenship, or a loss of diplomatic protection, during the continuance of the service.² In the case of a citizen who became engaged in service against a country with which the United States was at peace, Secretary of State Jefferson reasoned that the commission of an illegal act could not operate as a legal method of expatriation.³ When military service to a foreign state involves naturalization—which is not often the case—it has been held that expatriation is thereby effected.⁴

Although, under ordinary circumstances, military service abroad does not involve expatriation,⁵ it has been generally held that unneutral military service forfeits diplomatic protection.⁶ If American citizens

¹ *Santissima Trinidad* (1821), 1 Brock. 478; 7 Wheat. 283; Mr. Hunter, Ass't Sec'y of State, to Mr. Green, Sept. 10, 1880, Moore's Dig. III, 732; Mr. Bayard, Sec'y of State, to Mr. Whitehouse, Nov. 14, 1888, *ibid.* 734; Mr. Rives, Ass't Sec'y of State, to Mr. Putnam, Jan. 5, 1888, For. Rel., 1895, II, 850; Mr. Knox, Sec'y of State, to Mr. Moffat, Nov. 21, 1909, For. Rel., 1909, 451. See also *infra*, § 364. For a ruling to the contrary, see Mr. F. W. Seward, Ass't Sec'y of State, to Mr. Thomas, May 5, 1877, Moore's Dig. III, 733.

² *Infra*, p. 772.

³ From report of Mr. Webster in Thrasher's case, quoted in Moore's Dig. III, 731. Bar considers as absurd the former rule of German law that by entering foreign military service a German lost his nationality. Section 59.

⁴ *Kircher v. Murray*, 54 Fed. 617; Mr. F. W. Seward, Act'g Sec'y of State, to Mr. Foster, Aug. 13, 1879, For. Rel., 1879, 824; Mr. Hay, Sec'y of State, to Mr. Turley, April 6, 1899, Moore's Dig. III, 735; *Martin (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2467 and cases cited (award by Palacio, Mexican commissioner).

⁵ Unauthorized military service abroad forfeits citizenship in certain countries. *Supra*, p. 687.

⁶ *Infra*, § 364.

are taken prisoners of war, however, the government has deemed it as still its duty to see that they are treated according to the rules of war.¹ If not engaged in unneutral service even their right to diplomatic protection is not affected.²

By the law of certain countries,³ the acceptance of military service abroad does not involve a loss of nationality, unless the subject disobeys a request to withdraw from the foreign service within a fixed time.

§ 336. Other Acts.

Among other acts which have been held not to effect expatriation are the imposition of naturalization by a foreign government against the will of the citizen,⁴ the acceptance of minor political offices from foreign governments⁵ or the exercise of political rights, such as voting,⁶ under circumstances not indicating any intention to renounce original allegiance, and the acceptance of titles of nobility from foreign governments.⁷ The distinctions attendant upon long continued residence abroad in its effect upon expatriation have been fully discussed.⁸

¹ *Infra*, p. 768.

² *Dictum* of Mr. Bayard, Sec'y of State, to Mr. Whitehouse, Nov. 14, 1888, Moore's Dig. III, 734; *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 454.

³ *E. g.*, Germany, Italy and Austria-Hungary. *Supra*, p. 687.

⁴ *Supra*, p. 535.

⁵ Office of Swiss vice-consul at New York, Mr. Peshine Smith, Solicitor, to Mr. Louis Boerlin, Oct. 12, 1869, Moore's Dig. III, 716; Mr. Rives, Ass't Sec'y of State, to Mr. Sewall, Jan. 6, 1888, *ibid.* 718. See also *infra*, § 380. But see Medina's case, Mr. Davis, Ass't Sec'y of State, to Mr. Weile, April 18, 1870, *ibid.* 737. See next footnote.

⁶ *Calais v. Marshfield* (1849), 30 Maine, 515; *State v. Adams* (1876), 45 Iowa, 99; *Ware v. Wisner* (1883), 50 Fed. 310.

⁷ Mr. Bacon, Act'g Sec'y of State, to Mr. Bryan, May 16, 1907, For. Rel., 1907, II, 957. Mr. Bacon stated: "The acceptance of a title from a foreign government is so opposed to the spirit of our institutions and laws that, although not specifically forbidden, and therefore not sufficient in itself to work expatriation, it is a circumstance to be considered in determining whether or not an American citizen has expatriated himself."

⁸ *Supra*, § 326 *et seq.*

CHAPTER III

FORFEITURE OF PROTECTION BY ACT OF CITIZEN—Continued. CENSURABLE CONDUCT OF THE CLAIMANT

§ 337. General Principles. Topical Division.

It is often stated that allegiance and protection are correlative. There is this difference, however, that while the duty of fidelity inherent in allegiance is absolute, the duty of the state to protect is conditional on various circumstances, the modifying effect of which it is within the state's discretion to estimate. One of the most frequent reasons for a denial, or at least, a limitation in the extent of the state's diplomatic protection is the inequitable or censurable conduct of the citizen.

It is an established maxim of all law, municipal and international, that no one can profit by his own wrong, and that a plaintiff or a claimant must come into court with clean hands. We shall, therefore, in this chapter discuss those cases in which foreign offices or international commissions have refused, or at least, limited the protection ordinarily extended to injured citizens because the acts of the claimant himself have made such protection unjustifiable either in whole or in part. The many cases of this character which have occurred in the diplomatic history of the United States and of other nations during the last hundred years may be classified under certain definite heads, under which we shall undertake to treat the subject: first, censurable conduct generally; second, concealment of citizenship; third, fraud in the presentation or merits of the claim; fourth, the evasion of national duties and particularly military service; fifth, the breach by the citizen abroad of (a) the local law; (b) international law,—assuming, for the purpose, that international law imposes duties upon citizens—; and (c) his national law. Because of the great variety of cases occurring under heading five (b) and (c), these heads have

been further subdivided into numerous classes of censurable or reprehensible conduct, which, while actually a breach of national or of international law, nevertheless warrant separate treatment by themselves. We will therefore discuss, under a sixth head, trading with the enemy or prohibited or unlawful trading, and under head seventh, unneutral conduct or unfriendly act, which will include (a) privateering; (b) unlawful expeditions; (c) unneutral service, particularly military service; (d) unneutral conduct in act and "aid and comfort" to the belligerents.

INEQUITABLE CONDUCT GENERALLY

§ 338. *Ex Dolo Malo Non Oritur Actio.*

The general maxim *ex dolo malo non oritur actio* applies especially to most of the limitations on diplomatic protection discussed in this chapter. No court will lend its aid to a man who founds his cause of action on an immoral or illegal act. Numerous cases have arisen where the injury to the claimant resulted from his own negligence. The local government therefore was either absolved from all responsibility or its liability greatly reduced, for, as will appear, the doctrine of comparative negligence has been applied in international law and practice.¹

Thus, in the Davis case against Venezuela,² a Venezuelan custom-house official made a wrongful delivery of the claimant's goods to persons other than the rightful consignee. Yet the Umpire (Plumley), in dismissing the claim, held that the wrong delivery was only made

¹ In the municipal law of most countries the doctrine of comparative negligence is fully accepted; not so, however, in the United States where there is much opposition to fixing degrees of negligence (18 Harvard Law Review, 536-537).

² Davis (Gt. Brit.) v. Venezuela, Feb. 13, 1903, Ralston, 405. For other claims which were disallowed on the ground that the damage was due wholly or partly to the claimant's own fault or negligence, see *The Elizabeth* (Gt. Brit.) v. U. S., Nov. 19, 1794, Moore's Arb. 4001; *The Fame*, *ibid.* 3100 (laches in taking appeal from decision of prize court); *Heidsieck* (France) v. U. S., Jan. 15, 1880, *ibid.* 3313, 3316; *Selkirk* (U. S.) v. Mexico, July 4, 1868, *ibid.* 3130; *Farnam v. Peruvian Indemnity*, Mar. 17, 1841, *ibid.* 4598 (certain expenses, caused by claimant's own action, disallowed); *Schooner Henry Crosby v. Dominican Rep.*, For. Rel., 1895, I, 215-233; *The Vizen* (Gt. Brit.) v. Russia, 26 St. Pap. 2-60; *Queen of the Seas and Deerhound v. Spain*, 65 St. Pap. 508-527; see also 2 Wharton, § 243, p. 700.

possible by the gross negligence of the claimant, the consignor, in failing to appoint a resident agent at Venezuela to receive goods.

The Court of Claims has had occasion to apply this principle in several cases. Thus, in the case of *Illinois Central Railway Co. v. The United States*,¹ the court held that there can be no implied contract to indemnify a claimant against a loss caused by his own neglect of duty. Nor will a special act of Congress relieving contractors from liability to the government, relieve them from the legal consequences of their own negligence when seeking to recover damages from the government.²

§ 339. Disloyalty and Unneutral Conduct.

The Court of Claims in construing statutes giving that court jurisdiction of certain classes of claims against the United States, has had occasion to interpret the effect of certain conditions or disqualifying conduct intended to bar the claimant's right to relief. Under the Abandoned or Captured Property Act of March 12, 1863 (12 Stat. L. 820), the disloyalty of the claimant to the United States during the Civil War deprived him of the benefit of claiming under the Act. Similarly, under the fourth section of the Act of March 3, 1883, known as the Bowman Act, a claim for military supplies taken by or furnished to the United States during the Civil War required proof of the claimant's loyalty. It was held that mere residence in the insurrectionary territory raised the presumption of disloyalty which the claimant must overcome in the preliminary inquiry prescribed by the Bowman Act;³ and that a person who voted for secession only because he thought the safety of himself and family required it, could not be held to have been loyal.⁴

The disloyalty or unneutral acts of one partner in a firm without affirmative evidence that the other partner remained loyal created a presumption that the disloyalty of the one was imputable to the other;⁵ and the general rule followed is that in partnership transac-

¹ *Illinois Central Railway Co. v. The United States*, 16 Ct. Cl. 312.

² *Henegan v. The United States*, 17 Ct. Cl. 273.

³ *Nance v. The United States*, 23 Ct. Cl. 463.

⁴ *Fletcher v. The United States*, 32 Ct. Cl. 36.

⁵ *McStea (Gt. Brit.) v. The United States*, Second Alabama Claims Court, Act of June 5, 1882, Moore's Arb. 2331.

tions, the disloyalty or unneutral conduct of one of the partners binds the firm,¹ though international courts have shown a willingness to admit evidence that the transaction was not a partnership enterprise and that the innocent partner was not responsible for the disloyal acts of the other partner.²

In certain cases where persons in rebellion against the United States, being excluded from the right to sue under the Act of March 12, 1863, based their right to recover the value of cotton captured, the proceeds of which were turned into the Treasury, on an implied contract, alleging that they were not able to sue under the Act because they were not amnestied until after the expiration of the time allowed for suit, the court held that it was the claimant's own wrong if he was a rebel and his negligence that he had not been sooner amnestied.³ Nor did the pardon and amnesty granted by President Johnson on December 25, 1868 (15 Stat. L. 711), to those who had adhered to the Rebellion, with the restoration of rights, privileges, and immunities under the Constitution, operate retroactively to refund to a claimant the value of property seized while he was a rebel.⁴

The fact of having served the Rebellion was not considered by Secretary of State Fish as sufficient reason for withdrawing protection from United States citizens, in Egypt after the termination of the Rebellion, who had so served.⁵

§ 340. Effect of Censurable Conduct in Certain Cases.

Several cases under the Abandoned or Captured Property Act related to captures at sea and brought up interesting points of law in connection with the construction placed upon various attempts to avoid capture. The abuse by the claimant of a certain concession was held to justify its revocation by the government and to estop

¹ *Hargous (U. S.) v. Mexico*, Domestic Commission under Act of March 3, 1849, Moore's Arb. 1280-1283; *Schreiner v. U. S.*, 6 Ct. Cl. 360.

² *Levois & Co. v. U. S.*, Act of June 23, 1874, Moore's Arb. 2358.

³ *Haycraft v. The United States*, 8 Ct. Cl. 483.

⁴ *Knote v. The United States*, 95 U. S. 149.

⁵ Mr. Fish, Sec'y of State, to Mr. Butler, Oct. 5, 1871, Moore's Dig. VI, 621. As these persons had, however, by contract with the Khedive renounced the right to appeal to their own Government, Mr. Fish then stated that there would be "no ground of interference."

the claimant from demanding compensation.¹ If the claimant has by his own acts provoked the injury, the right to protection will be either forfeited or seriously weakened. So where he incites a mob he must bear the consequences of an injury incurred. This rule was laid down by the Institute of International Law.² Resistance to the police authorities estops the claimant from demanding compensation for the resulting injury, unless the injury is manifestly disproportioned to his own offense.³

In cases where a claim is based upon services to a foreign government arising out of acts against public policy, diplomatic protection will be refused. Thus, claims founded upon services for lobbying before Congress in behalf of claims of foreign governments or for the revision of awards have been emphatically denied support.⁴

Ralston, umpire in the Poggioli case,⁵ held that even though claimants may have been usurers and have aroused their neighbors by their sharp bargainings and heartless collection of their debts, that even though all their injuries were to be attributed to personal animosities, "these excuses [were] not, however, of a character to affect liability if it otherwise existed."

The Pelletier claim against Haiti, in which the claimant was shown to have been guilty of slave trading in Haitian waters, gave Secretary of State Bayard occasion to express an emphatic opinion on the general question of turpitude of the cause of action as barring the claim:

"Even were we to concede that these outrages in Haitian waters were not within Haitian jurisdiction, I do now affirm that the claim of Pelletier against Haiti . . . must be dropped, and dropped peremptorily and immediately by the . . . United States. . . . *Ex turpi causa non oritur actio*: by innumerable rulings under Roman common law, as held

¹ Paquet (Belgium) v. Venezuela, March 7, 1903, Ralston, 270.

² 17 Annuaire (1898), 96 *et seq.*; 18 *ibid.* 254 *et seq.*; Despagnet, Cours de droit international public, Paris, 1910, 4th ed., p. 472. Oppenheim (2nd ed., I, 397) stated that his government in deciding whether to extend protection must consider "whether his behaviour has been provocative or not."

³ Baker (U. S.) v. Peru, Jan. 12, 1863, Moore's Arb. 1625; Brand (U. S.) v. Peru, Moore's Arb. 1625.

⁴ Jewett claim v. Brazil; Monitor claims v. Japan; Matchett claim v. Venezuela, Moore's Dig. VI, § 974.

⁵ Poggioli (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 866.

by nations holding Latin traditions, and under the common law as held in England and the United States, has this principle been applied.”¹

Numerous claims have been disallowed on the equitable maxim that a claimant must come into court with clean hands, thus barring recovery by a claimant who was himself a wrongdoer.²

In some of the claims arising out of the Zerman filibustering expedition against Mexico in 1857 (*infra*, p. 762) the criterion of guilty knowledge of the unlawful character of the expedition was applied by Thornton, umpire of the Mixed Commission of July 4, 1868, in determining the claimants' right to an award. Thus where the claimant knowingly took part in the expedition his claim was denied,³ or at least, Thornton said, the “lowest possible” amount of damages should be allowed for the unnecessary and illegal delay in proceeding with his trial and the undoubtedly harsh treatment to which he was exposed. Similarly, ignorance of the unlawful character of the expedition was interpreted as a lack of prudence, but little short of guilty knowledge.⁴ A lack of discretion in chartering his vessel to the expedition likewise reduced the amount of damage awarded to a captain for the confiscation of the vessel and the harsh treatment and illegal delay in trial,⁵ although the owner of the chartered vessel, having no knowledge of the illegal character of the expedition, was held to be entitled to the full value of the vessel, the Mexican authorities having failed to release her within a reasonable time.⁶

§ 341. Censurable Conduct Extraneous to Injury or Claim.

Censurable conduct extraneous to the particular act out of which the claim arose has sometimes induced the government to decline its protection. Thus a fugitive from justice, Mears, who had participated in the fraud perpetrated by Gardiner and others in the Mexican

¹ For. Rel., 1887, pp. 606-607; see the award in Moore's Arb. 1749, against which, in response to a Senate Resolution, Mr. Bayard presented an adverse report.

² Clark (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 2749; *Medea and Good Return* (U. S.) v. Ecuador, Nov. 25, 1862, *ibid.* 2739.

³ Craig, Ballentine, McCurdy (U. S.) v. Mex., July 4, 1868, Moore's Arb. 2768-9.

⁴ Dolan (U. S.) v. Mex., July 4, 1868, Moore's Arb. 2769.

⁵ Rebecca Adams, Andrews (U. S.) v. Mex., July 4, 1868, Moore's Arb. 2769-71.

⁶ *Ibid*

Claims Commission (*infra*, p. 726) was held not to be entitled to the protection of the United States because of his alleged maltreatment in Mexico. Mr. Marcy on that occasion said:

"It is not over criminals or fugitives from justice in foreign countries. . . . that this government is bound to throw the shield of its protection."¹

However the criminal conviction of a citizen in a foreign country has been held in itself not to be sufficient cause for refusing a passport.²

It has already been observed that a passport is refused to an American citizen if it is believed that the passport will be put to an improper or unlawful use, but mere censurable or even immoral conduct has on certain occasions not been deemed a sufficient cause for the refusal of a passport. In fact, an examination of the cases indicates that the conduct which has generally justified refusal of a passport was actually a violation of the laws of the United States. Thus, so long as Mormon missionaries abroad taught polygamy, the diplomatic and consular agents of the United States were instructed to refuse protection to Mormon missionaries.³ The causes of refusal, it seems, are not subject to general rules, but depend upon considerations applicable to each particular case.⁴

¹ Moore's Dig. III, 789-790; Mr. Marcy, Sec'y of State, to Mr. Gadsden, Minister to Mex., No. 54, Oct. 22, 1855. For the case of Mears and Gardiner, see Moore's Arb. 1255-65. For the case of Winslow, see Mr. Bayard, Sec'y of State, to Mr. Hanna, Minister to Argentine, June 25, 1886, Moore's Dig., III, 922.

² The reason for Mr. Bayard's so holding was "because foreign convictions of crime are not to be regarded as extraterritorial in their operation." Mr. Bayard, Sec'y of State, to Mr. Walker, Mar. 29, 1888, For. Rel., 1888, I, 420; Moore's Dig. III, 923; The American Passport, Wash., 1898, p. 119. See also Mr. Adee, Act'g Sec'y of State, to Mr. Conger, For. Rel., 1899, p. 186.

³ For. Rel., 1884, pp. 10, 198; see also For. Rel., 1898, pp. 347, 354.

⁴ Mr. Wilson, Act'g Sec'y to Mr. Beaupré, April 27, 1907, For. Rel., 1907, p. 1083. The cases cited and opinions quoted in Moore's Dig. III, 919 *et seq.* show that the refusal to issue a passport has generally rested upon a breach of United States laws. These cases will be referred to later (*infra*, § 352). In the Waldberg case passports were refused because Waldberg was engaged in blackmailing projects and was disturbing or endeavoring to disturb the relations of this country with the representatives of foreign powers. While it is true that the intended accomplishment of a criminal purpose would justify refusal of the passport, a case in China in 1899 in which Act'g Sec'y Adee directed the issuance of a passport to two lewd women in Port Arthur who desired its protection while continuing to ply their disreputable vocation raises

In cases of actual injury to person or property, with the resultant demand for protection and the advancement of a diplomatic claim, the general doctrine of censurable conduct of a claimant operating as a bar to recovery appears to apply only when the claim is directly connected with or is an outgrowth of such censurable conduct. Thus, the Department of State supported various claims for indemnity arising out of the destruction or injury to houses of prostitution by Government troops in China, on the ground that the occupation and morals of the claimant were in no way connected with or contributory to the loss, following in this respect the decisions of municipal courts, which hold that statutes for the suppression of disorderly houses do not justify their destruction.¹

CONCEALMENT AND DENIAL OF CITIZENSHIP

§ 342. Departmental Rulings.

Citizenship represents not only a legal relation but a patriotic one and the Department of State in extending protection may take into account the censurable conduct of the claimant in denying or concealing his citizenship. Thus, it has frequently happened that naturalized citizens have returned to their native country and there, concealing their naturalization, pass themselves off as citizens of the native country until occasion makes it their interest to ask the intervention of the country of their adoption. Mr. Fish and other secretaries of State have considered that such concealment of citizenship absolves the government of the United States from the obligation to protect the offenders as citizens, at least while they remain in their native country.²

a question as to the character of the act necessary to forfeit the right to a passport. Mr. Adee could not find that these practices by American citizens, however nefarious, were in violation of the United States statutes (For. Rel., 1899, p. 186). We must bear this holding in mind in considering the opinion of the Solicitor of the Department of State that "if it appears that the applicant keeps a disorderly house, or that he is engaged in gambling or that he has violated knowingly, notoriously, the laws of his residence, it may well be that the United States would not care to make itself a party to such misconduct by the issue of a passport." (Op. of the Solicitor, For. Rel., 1907, pp. 1079-1080.)

¹ *Welch v. Stowell*, 2 Dougl. (Mich.), 332, 19 L. R. A. 198; *Conithan v. Royal Ins. Co.*, 91 Miss. 386, 18 L. R. A. n. s. 214; *Phoenix Ins Co. v. Clay*, 101 Ga. 331.

² Consular Regulations of the U. S., 1874, paragraph 110; Mr. Fish, Sec'y of State,

Natives of Russia and Turkey who become naturalized in the United States, often return to their native countries, concealing their American naturalization because of their liability to punishment for expatriation. In the Notices issued to former subjects of those countries, the Department has included the following provision: "The Department of State holds that a naturalized American citizen of Russian [Turkish] origin who returns to his native country as a Russian [Turkish] subject, concealing the fact of his naturalization in order to evade Russian [Turkish] law, thereby so far relinquishes the rights conferred upon him by his American naturalization as to absolve this Government from the obligation to protect him as a citizen while he remains in his native land." It naturally follows that the Secretary of State, in the exercise of his discretion, may refuse to issue a passport to a man admittedly an American citizen who has concealed or denies his American citizenship.¹

§ 343. Decisions of International Tribunals.

In the case of *Casanova* before the United States-Spanish Mixed Commission of 1871,² Lowndes, arbitrator, expressed the opinion that if a person desired to protect himself by his citizenship, he must give notice of it and claim the rights he may possess by virtue of his nationality. This was a *dictum* in connection with the agreement made between the United States and Spain, Feb. 12, 1871, to cover the case of the many Cubans who had gone to the United States, remained just long enough to secure American naturalization, and then returned to Cuba. Spain thus obtained recognition for her contention that such an individual should, in order to claim rights as an American citizen, have given notice of his American citizenship to the Spanish authorities, under penalty of estoppel. The agreement read in part:

to Mr. Hall, May 3, 1869, S. Ex. Doc. 108, 41st Cong., 2nd sess., 202, Moore's Dig. III, 770-771; Mr. Gresham, Sec'y of State, to Mr. Terrell, Minister to Turkey, July 11, 1894, For. Rel., 1894, pp. 733, 735; Mr. Hill, Act'g Sec'y of State, to Mr. Griscom, chargé, No. 345, Feb. 16, 1901, Moore's Dig., III, 771.

¹ Memo. of the Solicitor referring to case of J. H. Brown, January 2, 1907, For. Rel., 1907, p. 1079.

² *Casanova* (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. 2571-2.

"The arbitrators shall not have jurisdiction of any reclamation made in behalf of a native-born Spanish subject naturalized in the United States if it shall appear that the same subject-matter having been adjudicated by a competent tribunal in Cuba and the claimant, having appeared therein, either in person or by his duly appointed attorney, and being required by the laws of Spain to make a declaration of his nationality, *failed to declare that he was a citizen of the United States*; In such case and for the purposes of this arbitration, it shall be deemed and taken that the claimant, *by his own default had renounced his allegiance to the United States*"¹ (*italics ours*).

The representation by a naturalized American citizen abroad that he is not an American operates as a bar to recovery upon a claim before a commission having jurisdiction of claims of American citizens. Thus, in the well-known case of Lacoste,² who permitted himself to be regarded as a French subject in Mexico and presented to the French-Mexican Mixed Commission, as a French subject, the same claim which he later presented, as a United States citizen, to the United States-Mexican Commission of 1868, Thornton, umpire, expressed the opinion that "by such conduct . . . he forfeited his right to consideration by this commission."

Similarly, the birth of the claimant in the United States, of French parents, followed by his removal while still a minor, to Mexico, establishing a commercial house there and presenting a claim as a French citizen to the French-Mexican Mixed Commission was held to estop

¹ Moore's Arb. 2562. Notice of citizenship was considered necessary in order to maintain a claim for violation of rights attaching to such citizenship in the case of J. O. Wilson, No. 121, Delgado, No. 31, and by Potestad, arbitrator for Spain, in the case of Zenea, Moore's Arb. 2571. In the latter case, Potestad held that the possession even of a passport from the Cuban Republic designating him as a United States citizen coupled with his own silence during his long imprisonment does not constitute notice. The failure to give notice does not seem to have operated as a bar to a claim for the appropriation of property (in the Zenea case, the taking of money; in the Wilson case, Moore's Arb. 2454, for the seizure of property), although in the Wilson case it did bar a claim for the *use* of property by Spain. Lewenhaupt, umpire, held that the concealment of citizenship (in the Wilson case for over 51 years) by a claimant does not forfeit his right to appear before the commission as an American citizen, although, as stated, it bars a claim for the *use of property* during the period citizenship was concealed.

² Lacoste (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2561. See also *dictum* in Canevaro (Italy) v. Peru, April 25, 1910, 6 A. J. I. L. (1912), 746, 747.

him from asserting American citizenship, especially where both by French and Mexican law he was considered a citizen of France.¹

It has already been observed that a number of countries require that their citizens abroad register themselves at their legation or consulate. Thus Belgium, Italy, Spain, Portugal, France, Mexico, and now by the act of 1907, the United States, require that citizens abroad register their citizenship periodically at the nearest national consular office. Whether the failure to comply with these requirements would operate to forfeit protection is open to question, although it would undoubtedly constitute an important factor, among others, in determining the citizen's right to protection. Pradier-Fodéré, as already noted, denies that the mere failure to comply with a formality of this kind can forfeit such an important and vital right as that of citizenship and its incidental rights. Similarly, certain foreign countries have required that aliens register their foreign nationality with local authorities in order to acquire the benefit of the rights of foreigners. This has usually taken place in countries frequently disturbed by revolutionary troubles, such as the Latin-American countries, and particularly Salvador, Guatemala and others. As will be noted hereafter, the United States and other countries have declined to consider the rights of their citizens to be dependent upon compliance with a formality of this kind.

Mexico in its constitution of 1857 provided that aliens acquiring real estate in Mexico became Mexican citizens, unless a contrary intention was manifested. In the United States-Mexican Mixed Claims Commission of 1868, a number of claims were presented by American citizens who had purchased Mexican real estate and had failed to declare their intention to retain American citizenship. Lieber, Umpire, in one such case,² in declining to consider such omission as a forfeiture of citizenship, expressed himself as follows:

"Citizenship . . . is too weighty a matter to be lost or gained by mere implication or omission of a comparatively trifling act, or the registering of a mere declining of a benefit, which the coupling of

¹ *Gautier (U. S.) v. Mex.*, July 4, 1868, *Moore's Arb.* 2450.

² *Elliott (U. S.) v. Mex.*, July 4, 1868, *Moore's Arb.* 2481; the same opinion in *Anderson and Thompson v. Mexico*, *American Docket*, No. 333, Op. I, p. 270, *Moore's Arb.* 2480.

Mexican citizenship with acquisition of land was undoubtedly intended to be."

Thornton, who succeeded Lieber as umpire of that commission, in numerous other cases¹ held that the requirement of the constitution that the holding of land involved Mexican citizenship is permissive and not obligatory and that the failure of claimants to avail themselves of that permission was sufficient proof that they did not wish to do so.

Foreigners, it seems, were required by Mexican law to take out a letter of safety, *carta de seguridad*. Thornton, umpire of the 1868 commission, considered that the failure to take out such a letter could not forfeit citizenship.² The fact that an American citizen took out a *carta de seguridad* as a citizen of Chile was considered by Umpire Thornton (in a *dictum*)³ not to deprive the claimant of his American citizenship, although it might have afforded the United States government a ground to refuse him its protection.

In certain cases decided by the Commission under the Convention of July 4, 1831 with France, the misconduct of a neutral in endeavoring to mask the property of an enemy by commingling it with his own, so as to evade capture and condemnation was punished by a forfeiture of his national claim, as a neutral, to immunity from capture and confiscation.⁴ On the other hand, the colorable transfer of vessels from the American to the British flag during the Civil War, with the purpose of evading capture by the *Alabama* and other Confederate cruisers was held by both courts of *Alabama* claims not to forfeit their right to American protection.⁵

FRAUDULENT AND EXORBITANT CLAIMS

§ 344. Claims against United States.

A false, fictitious, or fraudulent claim against the United States when made with knowledge of its fraudulent character is punishable

¹ Opinions quoted and cases cited in Moore's Arb. 2482.

² Smith Bowen (U. S.) v. Mex., July 4, 1868, No. 442, American Docket, I, 156-214, cited in Moore's Arb. 2482.

³ Pradel (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2543-45.

⁴ Moore's Arb. 4479.

⁵ *Texan Star*, Stevens & Co. v. U. S., Moore's Arb. 2378, 4653, 4673.

by imprisonment at hard labor from one year to five years, or fine from one thousand to five thousand dollars, according to § 5438 of the Revised Statutes, which specifies the character of the acts which shall be considered as coming within the provisions of the section. In the Court of Claims Act (Revised Statutes, § 1086) which has now become § 172 of the new judicial code (36 Stat. L., I, 1141), it is provided that

“any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim . . . shall *ipso facto* forfeit the same to the government.”

The Court of Claims upheld the terms of the statute in the case of *Furay*.¹ Under the Abandoned or Captured Property Act, in which loyalty was a jurisdictional fact, the Court of Claims held that the concealment of disloyalty on the part of a claimant is such “fraud, wrong or injustice” against the United States as will entitle the government to a new trial under the provisions of the Act of June 25, 1868.²

§ 345. Claims against Foreign Governments.

The United States has on a number of occasions been made the victim of fraud in presenting claims against a foreign government. Where the fraud is discovered in advance the Department of State will of course decline to press the claim against the foreign government. Secretary of State Seward ably expressed the practice of the Department in a note to the British minister on May 30, 1862:

“Nations cannot afford to have the intercourse which the interests of their citizens require to be kept open, subjected to the annoyances and risks which would result from the admission of fraud or duplicity into such intercourse. It has therefore become a usage, having the authority of a principle, in the correspondence between enlightened governments, in relation to the claims of citizens or subjects, that any deception practiced by a claimant upon his own government in regard to a controversy with a foreign government, for the purpose of enhancing his claim, or influencing the proceedings of his government, forfeits all

¹ *Furay v. The United States*, 34 Ct. Cl. 171. See also Act of the Hawaiian government, March 16, 1895, for the judicial investigation of claims, parag. 7, 87 St. Pap. 1230-1231.

² *Tait v. The United States*, 5 Ct. Cl. 638.

title of the party attempting such deception to the protection and aid of his government in the controversy in question, because an honorable government can not consent to complicate itself in a matter in which it has itself been made or attempted to be made the victim of a fraud, for the benefit of the dishonest party.''¹

The fraud, however, has sometimes been discovered only after the claim was paid by the foreign government either in whole or in part, through diplomatic negotiations or through international arbitration. In such cases the Secretary of State or Congress has set aside a settlement or award obtained by fraud and has not only declined to pay undistributed portions to fraudulent claimants, but has refunded to the foreign government such portions of awards made on fraudulent claims as had already been distributed to the claimants. Thus, all the awards made by the 1866 United States-Venezuelan Commission were set aside on the ground of fraud.² Awards of the Domestic Commission under the Act of March 3, 1849 were set aside by the courts in the famous Gardiner case³ and by direct act of Congress in the Atocha⁴ case. Congress similarly reopened two of the awards under the Chinese Claims Treaty of 1858,⁵ and in the case of the *Caroline*,⁶ the Secretary of State refunded to Brazil, against the protest of the claimant, certain moneys which had been paid by Brazil after diplomatic settlement. Congress appropriated a large sum to reimburse Brazil for moneys paid to United States representatives, but which never reached the Treasury.⁷

The most famous cases of the representation of fraudulent claims were those of Weil and La Abra Silver Mining Co. before the United States-Mexican Mixed Claims Commission of 1868.⁸ These cases

¹ Mr. Seward, Sec'y of State, to Lord Lyons, British Min., May 30, 1862 (MS. Notes to Gt. Brit., IX, 187; Moore's Dig. VI, 622).

² Moore's Arb. 1659 *et seq.* It is true that the fraud was on the part of the tribunal and not of the claimants.

³ For the full history of this case, see Moore's Arb. 1255-1266.

⁴ 13 Stat. L. 595; 16 Stat. L. 633.

⁵ 15 Stat. L. 440; 20 Stat. L. 171.

⁶ Moore's Arb. 1342.

⁷ 18 Stat. L. 70; S. Ex. Doc. 52, 43rd Cong., 1st sess.

⁸ For a full history of these cases up to the decision of the Supreme Court in the La Abra case and the refund to Mexico, see Moore's Arb. 1324-1349. See also *supra*, p. 375.

were referred to the Commission of 1868 without previous examination by the Department of State. Large awards were made on both claims, induced by perjured testimony of the most vicious character. Mexico paid a number of installments on the awards, protesting through many years that they were obtained by fraud. For a long time the Department of State insisted on the payments on the ground of the finality of the award, but the suspicion of fraud became so strong that finally Congress and the State Department itself recommended a reëxamination of the claims. A treaty providing for an international commission for this purpose, after dragging through the Senate for a number of sessions, remained unconfirmed, and finally in 1892 Congress passed an act conferring jurisdiction on the Court of Claims to investigate both the Weil and La Abra cases and to determine whether the charges of fraud were well founded. After proper examination, the Court of Claims held that the awards in both cases,¹ were obtained by fraud and perjury. Thereupon, the Secretary of State returned to Mexico all payments on these two claims which were in the hands of the Department,² and Congress appropriated a large sum of money for the re-payment to Mexico of the installments which had already been turned over to the claimants.³ Before the decision as to the fraudulent character of the claims was reached, assignees of the original claimants brought two mandamus proceedings to compel the distribution of the sums received by the Department of State. One was directed against Secretary Frelinghuysen, and the other against Secretary Blaine.⁴ In dismissing the petitions for mandamus, the Supreme Court examined thoroughly the legal position of the government in the presentation of a claim against a foreign government and its liability for the distribution of an award obtained by fraud. One paragraph may be quoted from the decision of Chief Justice Waite in the Frelinghuysen case:

“The presentation by a citizen of a fraudulent claim or false testimony for reference to the commission was an imposition on his own government, and if that government afterwards discovered that it had in

¹ U. S. v. La Abra Silver Mining Co., 29 Ct. Cl. 432; 32 Ct. Cl. 462, affirmed in 175 U. S. 423. U. S. v. Weil, 29 Ct. Cl. 523; 35 Ct. Cl. 42.

² For Rel., 1900, pp. 781-782.

³ 32 Stat. L. 5.

⁴ Frelinghuysen v. Key, 110 U. S. 63; U. S. ex rel. Boynton v. Blaine, 139 U. S. 306.

this way been made an instrument of wrong toward a friendly power, it would be not only its right but its duty to repudiate the act and make reparation as far as possible for the consequences of its neglect. . . . Claims presented and evidence submitted to such an [arbitral] tribunal must necessarily bear the impress of the entire good faith of the government from which they come and it is not to be presumed that any government will for a moment allow itself knowingly to be made the instrument of wrong in any such proceeding."

As an incident to the Weil and La Abra cases we may mention the bill¹ to prevent and punish the prosecution, under the protection of the United States, of fraudulent claims against foreign governments, which was introduced in Congress on June 16, 1884. The provisions of the bill followed those of § 5438 of the Revised Statutes (*supra*, p. 725) which punished the presentation of fraudulent claims against the United States, and were intended to make it an offense equally punishable to present fraudulent claims to the Department of State for prosecution against a foreign government.² The bill seems never to have passed.

It has already been seen that naturalization obtained by fraud will not serve as a title to protection, but will, in fact, upon discovery, result in a withdrawal of protection, and under certain circumstances, in a proceeding for the cancellation of the naturalization certificate.

As early as 1856 Secretary Marcy gave expression to the policy that the Department of State

"will not present to a foreign government claims for damages, which, though based on a wrong actually done, are speculative and exorbitant in amount."³

It has been observed, however, that the Department, in the exercise of its discretion and full control over the claim, does not necessarily reject it, but may reduce it in amount.

EVASION OF NATIONAL DUTIES

§ 346. Desertion.

The most serious offense of this character is desertion from mili-

¹ H. R. 7352, 48th Cong., 1st sess.

² House Rep. 2391, 48th Cong., 2nd sess.

³ Mr. Marcy, Sec'y of State, to Mr. Munro, Jan. 10, 1856, Moore's Dig. VI, 615.

tary service. The instructions for the Government of Armies of the United States in the Field of April 24, 1863¹ provided in § 48 that

"Deserters from the American Army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture or being delivered up to the American Army; and if a deserter from the enemy, having taken service in the Army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation."

Section 1996 of the Revised Statutes which incorporated an Act of March 3, 1865² provides that

"All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost marshal within sixty days after the issuance of the proclamation by the President, dated the 11th day of March, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof."

The forfeiture did not, however, apply to soldiers and sailors who had served according to their enlistment up to the 19th of April, 1865. The penalties of § 1996 were extended in § 1998 to

"every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered."³

It has, however, been held that the provisions of §§ 1996 and 1998 can only take effect upon conviction by a court-martial.⁴ Desertion can be exercised only by persons of lawful age and not by those who leave their country under the charge or conviction of crime or other

¹ General Orders, No. 100, April 24, 1863, War of the Rebellion, Official Records, Series 3, v. III, p. 154. Quoted in Moore's Dig. VII, 234-235.

² 13 Stat. L. 490, ch. 79, § 21.

³ See also *United States v. Snow* (1877), 2 Flipp (U. S.), 127 Fed. Cas., No. 16,350; *Kurtz v. Moffitt* (1885), 115 U. S. 501.

⁴ *Kurtz v. Moffitt* (1885), 115 U. S. 501; *Huber v. Reily* (1866), 53 Pa. St. 112; *State v. Symonds* (1869), 57 Me. 148; *Severance v. Healey* (1870), 50 N. H. 448; 15 Op. Atty. Gen. 159 (1876).

disabilities.¹ Forfeiture of goods cannot, however, it seems, be inflicted as a penalty under this section.² The court in *Huber v. Reily* (1866), said that

“the forfeiture which it [the act] prescribes, like all other penalties for desertion, must be *adjudged* to the convicted person, after trial by a court-martial, and sentence approved,”

and the conviction, it seems, can be approved only by a duly authenticated record.³

Practically every European country provides severe penalties for desertion and evasion of military service. Generally the penalty involves the loss of citizenship and always the loss of the right to protection. In countries where military service is compulsory, such as Germany and France, in which a citizen remains subject to call to the reserves, when such service is deemed necessary by the government, he likewise incurs severe penalties for a failure to return home and respond to the call. This failure to heed the *jus avocandi*, as it is called, generally involves a loss of citizenship and with it a loss of the right to national protection.⁴

It has been observed that the United States has had difficulty in determining whether the taking of service abroad by a citizen of the United States involved the loss of citizenship and with it a loss of national protection. The test finally applied was whether the foreign service involved the taking of an oath of allegiance. If in entering such foreign service an oath of allegiance to the foreign state was necessary and was taken, the citizen thereby forfeited his right to protection⁵ at the very least, and since the Act of March 2, 1907, his citizenship as well.

¹ The American Passport, Washington, 1898, pp. 131-132.

² *Cavander's Case* (1872), 8 Ct. Cl. 283.

³ Strong, J., in *Huber v. Reily*, 53 Pa. St. 112, 120.

⁴ *Supra*, p. 686. As to the German rules for the forfeiture of protection by evasion of military service, see § VI of the Dienstinstruktion of June 6, 1871, law concerning the organization of the consular service, Nov. 8, 1867; Zorn, *Staatsrecht des deutschen Reiches*, II, 481, note 139.

⁵ See the recommendations of the Board on Citizenship, expatriation and protection, H. Doc. 326, 59th Cong., 2nd sess. So far as expatriation is concerned a number of court decisions (all prior to the Act of 1907) have declined to support the doctrine that the taking of an oath of allegiance to a foreign sovereign forfeited

While the United States does not by statute prescribe loss of citizenship in case of a failure to return in time of war, the Supreme Court has expressed itself as follows: ¹

"The duty of a citizen when war breaks out, if it be a foreign war and he is abroad, is to return without delay."

The Citizenship Board appointed in 1906 to make recommendations for a change in the laws concerning citizenship, expatriation, and protection, added that this duty was equally evident if the government is threatened by domestic insurrection. The government should be able to control the services of every citizen and the right of changing allegiance should not exist when the state is in peril. To this effect Halleck's statement was quoted, namely, that

"the right of voluntary expatriation exists only in time of peace and for lawful purposes." ²

Secretary of State Seward, in considering the claim of a naturalized citizen, a native of Sicily, who returned to that country shortly after his naturalization and in 1860 was despoiled of some of his property by the soldiers of the Kingdom of Naples during the siege of Palermo in that year, referred to the duty of a citizen to return home in times of domestic insurrection as follows:

"The reflection is a very obvious one that in such a crisis a good and loyal citizen might be expected to be at home in the United States and coöperate with his fellow citizens in maintaining the government against domestic enemies rather than to be residing abroad and invoking aid to prosecute claims of his own for redress of injuries which he may have suffered when domiciled amid the perils of a foreign revolution." ³

§ 347. Evasion of Duties of Citizenship Generally.

The right of the government to decline protection on account of an evasion of national duties has come up frequently in the case of citizens residing abroad for a long time, or in the case of naturalized citizenship. *Talbot v. Jansen* (1795), 3 Dallas, 133; *Fish v. Stoughton* (1801), 2 Johns. Cas. 407; see, however, *Brown v. Dexter* (1884), 66 Cal. 39 and *Kircher v. Murray* (1893), 54 Fed. 617.

¹ 5 Wall. 408.

² House Document 326, 59th Cong., 2nd sess., 28.

³ Seward, Sec'y of State, to Mr. Marsh, May 7, 1863, For. Rel., 1863, pt. II, p. 1067.

citizens returning to their native country. Thus, Secretary of State Fish, referring to a statement of Chief Justice Marshall's in the case of *Murray v. The Schooner Charming Betsy*,¹ stated:

"If, on the one hand, the Government assumes the duty of protecting his rights and his privileges, on the other hand the citizen is supposed to be ever ready to place his fortune and even his life at its service, should the public interest demand such a sacrifice. If, instead of doing this, he permanently withdraws his person from the national jurisdiction, if he places his property where it cannot be made to contribute to the national necessities; if his children are born and reared upon a foreign soil, with no purpose of returning to submit to the jurisdiction of the United States, then, in accordance with the principles laid down by Chief Justice Marshall and recognized in the 14th amendment, and in the act of 1868, he has so far expatriated himself as to relieve this Government from the obligation of interfering for his protection." ²

It has been noted that in determining the right of native citizens, permanently resident abroad under the regulations of July 26, 1910, to receive the protection of the United States, the evasion of national duties of citizenship constitutes an important factor. The former difficulties in establishing the title to protection of foreign-domiciled naturalized citizens have been much simplified by the presumptions of expatriation following a two and five years' residence abroad, under the Act of March 2, 1907.³

The United States has been frequently placed in a delicate situation by the demand for protection of naturalized citizens returning to their native countries, where military service is compulsory. These individuals having departed from their native country just prior to becoming eligible for military service, have secured naturalization in the United States and then, returning to their native country, have boasted of their immunity from service,—to the moral detriment of the community in which they live. The United States has not resisted the right of the foreign countries thus prejudiced to expel these undesirable pseudo-Americans. These individuals have as a matter of fact committed

¹ *Murray v. The Schooner Charming Betsy*, 2 Cranch, 120.

² Mr. Fish, Sec'y of State, to Mr. Washburne, Minister to France, June 28, 1873, For. Rel., 1873, I, 256, 259, Moore's Dig. III, 763.

³ *Supra*, § 330.

a fraud both upon their native and upon their adopted country in that they seek to escape the obligations due to both and to secure the privileges of citizenship in both as occasion may make it their interest to make use of them.¹ The interposition of the United States has been limited to securing an amelioration of the hardship of expulsion in particular cases, as, for example, securing an extension of the order until the individual could adjust his business affairs or could remove his family, or similar alleviation of a harsh situation.

Moreover, where American citizens by birth have gone abroad at an early age and remained permanent residents in countries where military service is compulsory, the United States has declined to aid them in escaping such military service, in the absence of evidence that the individual intends to return to the United States and reclaim his American citizenship and assume the duties of an American citizen.² Where a naturalized citizen has failed to fulfill military duties which had accrued and were owing at the time of his emigration from his native country, the United States will decline to protect him. By treaty and diplomatic negotiations, the United States has, however, established the definite policy that they will protect the naturalized citizen against the fulfillment of military duty which had not become due and owing from him at the time of his emigration from his native country.³

BREACH OF LOCAL (FOREIGN) LAW

§ 348. Limitations on Diplomatic Protection.

It is a fundamental principle of international law that the citizen abroad must obey the local law.

¹ Our diplomatic correspondence shows frequent cases of this character. Two of the leading cases are those of Hofmann, For. Rel., 1894, pp. 30-36 (see the striking letter of Mr. Tripp to Mr. Gresham, Sec'y of State, August 13, 1894), and the case of Selig Fink, For. Rel., 1908, p. 18, at p. 21. See also cases in Prussia, For. Rel., 1903, pp. 457-459. These cases are of course always judged on their merits and all the circumstances taken into account; and it requires the evidence of some apparently fraudulent evasion of national responsibilities to induce the Department to withdraw its protection from citizens naturalized in proper form.

² Edward Pierrepont, Atty. Gen., to Hamilton Fish, Sec'y of State, For. Rel., 1875, I, 565.

³ *Supra*, p. 676.

"Americans, whether native born or naturalized, owe submission to the same laws in Great Britain as British subjects, while residing there and enjoying the protection of that government." ¹

The question has frequently arisen in our international relations as to how far the United States will protect a citizen abroad who has violated the local law of the country of his residence. As will be noted, when criminal proceedings are involved, protection has not been absolutely declined, but it has in general been strictly limited to securing a fair trial and the application of the ordinary penalties or a concurrent attempt to ameliorate the harshness of arbitrary measures.

In the case of the Fenian movement in Ireland many naturalized Americans, natives of Ireland, were involved in suspicion of having incited the movement and were arrested under the suspension of the *habeas corpus* act in Ireland passed in February, 1866. The United States was often placed in a delicate position in extending protection. The principle generally followed may be expressed in the instructions of Mr. Adams, Minister of the United States, to Mr. West, American Consul at Dublin, namely:

"To secure a proper share of protection for innocent persons who were citizens of the United States without attempting to interfere on behalf of those who had justly subjected themselves to suspicion of complicity with treasonable practices." ²

In the case of Haggerty against Mexico ³ a claim was made for the destruction of property of a neutral American citizen in Texas, the property being under the guaranty of the protection of Mexico under the treaty of 1831 between the United States and Mexico. On proof, however, that the property was introduced into Mexico without having paid customs duties and in disregard of a decree closing the port and without certified invoice from the Mexican consul, the Commission held that the property was introduced not under the protection of Mexico, but in defiance of it and was hence without rights under the treaty mentioned.

¹ Mr. Seward, Sec'y of State, to Mr. Adams, Dipl. Cor., 1866, Pt. 1, cited from appendix to British Report on Aliens and Naturalization, 1869, pp. 47-48.

² Cockburn on Nationality, London, 1869, p. 86.

³ Haggerty *et al.* (U. S.) *v.* Mexico, Domestic Commission under act of Congress, Mar. 3, 1849, Moore's Arb. 2664.

A number of cases have arisen in which the injury, to redress which protection was demanded, arose out of a breach of the local law by a foreign subject. In one such case, an officer of the U. S. S. *Mohican* in a Brazilian port fired his pistol at one of the boatmen trying to desert. The officer was arrested and then released with a reprimand. On complaint by the captain that this was an offense to the officer's dignity and to our flag Mr. Seward, Secretary of State, answered that the officer's act

"was a breach of the peace, offensive to the dignity of Brazil, which the Government of that country may well expect the United States to disavow and censure. . . . The United States are not looking out for causes of complaint against foreign states."

It is a general rule that an injury to an alien arising out of a breach of or failure to observe the local law or police regulations involves a complete or partial forfeiture by the alien of the protection of his own government,¹ though the government will usually insist that his trial be fair and the punishment not unusual or disproportionate to his offense. International commissions have followed this rule. Thus, in the case of Santangelo, a naturalized American citizen, expelled from Mexico for publishing a periodical in which articles appeared tending to ridicule Mexico, the commissioners under the convention of April 11, 1839 made a large award because the expulsion was extremely harsh and disproportionate to the offense. The violation of a proclamation of Gen. Butler in New Orleans during the Civil War prohibiting the publication of articles reflecting on the United States, etc., by a certain Dubos, a French citizen, was held to have justified

¹ *Brand (U. S.) v. Peru*, January 12, 1863, Moore's Arb. 1625-1626; *Baker (U. S.) v. Peru*, January 12, 1863, Moore's Arb. 1626; Case of Koenigsberger in Guatemala (attempted smuggling), For. Rel., 1901, pp. 252-260; Case of the British brigantine *Hibernia*, unlawfully engaged in diving operations on the coast of Peru, 35 St. Pap. 1301. See also the cases of the British ship *Vixen*, seized by Russia for carrying a prohibited commodity (salt) into a Russian port (26 St. Pap. 2-60) and the British schooner *Araunah*, seized by Russia for seal-catching without license in Russian waters, in which cases Great Britain declined to interfere with the regular course of Russian law confiscating the vessels. American-owned vessels in Turkey, in 1912, were warned that a continued violation of local navigation regulations would result in a withdrawal of protection.

his arrest, but the failure to try him by military commission in accordance with the proclamation warranted an award.¹

We have seen that naturalized citizens returning to their native country are frequently called upon to do military service. Where such service had accrued and was due at the time of emigration from their native country, protection is withdrawn. Where the liability to service has not accrued previous to emigration, the United States has generally been able to relieve them from the burdens of service. However, by the local law of many countries the evasion of service is a violation of national law and is punished by expulsion should the citizen return to his native country. It has been observed that in such cases the United States limits its protection against the order of expulsion to securing either an extension of the order until business affairs can be adjusted, or a similar amelioration of the arbitrary application of the order.

§ 349. Acquittal of Criminal Charges. International Claim Unusual.

Demands for protection have come before foreign offices on the part of citizens abroad who were acquitted of alleged crimes by the local courts and thereupon demanded damages from the local government. The United States in a recent case of this kind,² in which a citizen was acquitted of the charge of counterfeiting, declined to press his claim on the ground that his acquittal did not establish his innocence of the crime charged, but that his defense was technical and successfully showed that the statutory crime of counterfeiting had not been committed.

Great Britain, in a case in which a British subject had been convicted in Haiti through gross irregularities in the trial, limited its protection to demanding his release from imprisonment, but declined to make any demand for indemnity on the ground that the circumstances showed that the Haitian government had good grounds for putting him on his trial, a jury on a first verdict having been equally divided as to his guilt.

¹ *Santangelo (U. S.) v. Mexico*, April 11, 1839, *Moore's Arb.* 3333, 3334; *Dubos (France) v. The United States*, January 15, 1880, *Moore's Arb.* 3319, 3321.

² *Case of Michael J. Kouri v. Haiti*, *For. Rel.*, 1906, pp. 871-2.

If complete innocence of a crime for which a citizen had been convicted and imprisoned were established, it is probable that the United States would, if judicial or administrative machinery were at fault, demand an indemnity on the ground of denial of justice, as has been done in a few cases ¹ notwithstanding the fact that up to the present time the United States fails to acknowledge the principle that in convicting an innocent man, it has committed against him a grievous wrong for which the state should indemnify him. Most of the European countries, as has been noted, provide by statute for the indemnification by the state of innocent persons erroneously convicted.²

The citizen abroad, therefore, who violates the local law does not sin away completely his right to the protection of his own government. That government will, in its discretion, take his censurable conduct and the jurisdictional rights of the local state into account, and will exercise ordinarily a protective surveillance not intended to exempt him from a penalty properly incurred, but limited to securing for him a fair trial and customary treatment.

BREACH OF INTERNATIONAL LAW

§ 350. Piracy and Slave Trade.

Attention has already been called to the prevailing theory that international law, having force among states only, cannot impose duties upon individuals. Hence many publicists would consider it a misnomer to speak of a breach of international law. Rehm is one of the very few, who, reasoning from the penalties imposed upon individuals for violations of blockades and for carrying contraband, argues that international law does bind individuals to some extent. We are not without some authority, therefore, in taking the position, even in a qualified sense, that individuals may violate international law.

The offenses against international law which involve a forfeiture of national protection may be divided into two broad classes: first, those which, while punishable by municipal law, are recognized as

¹ *Supra*, p. 196.

² Borchard, State indemnity for errors of criminal justice, S. Doc. 974, 62nd Cong., 3rd sess. Wisconsin and California enacted statutes to this effect in 1913.

sufficiently heinous in character to have been made, by convention and practice, violations of international law as well and punishable by any state having jurisdiction; and secondly, those acts which, while not punishable by municipal law, are admitted by all states as being subject to a recognized penalty on the part of the state aggrieved.

The offenses of the first class which have received the most prominence in international relations are piracy and the slave trade. The commission of piracy is regarded as a clear ground for the denial of protection. A pirate has placed himself outside the protection of any law—municipal or international.¹

In the early part of the nineteenth century the nations of the world agreed to stamp out the slave trade by the confiscation of vessels engaged in that obnoxious enterprise. By statute it is now illegal in practically all civilized countries. International arbitral commissions to which the United States have been a party have on two occasions dealt with such cases. The first was the case of the brig *Lawrence*, an American vessel which put into the British port of Freetown in Africa and was there seized and libelled on the ground that she was equipped for the African slave trade, although her papers indicated a general cargo for Havana. Bates, the umpire of the British-American commission of 1853, held that the owners of the vessel could not claim the protection of their government because at the time of the condemnation the slave trade was prohibited by all civilized nations and hence by the United States.²

Similarly, in the Pelletier case³ Secretary of State Bayard declined to enforce against Haiti an award made by the arbitrator on the ground that the arbitrator restricted himself to deciding whether piracy by the law of nations as distinguished from the piracy of municipal law

¹ Piracy, §§ 290, 303-305, of the Federal Penal Code of 1910; Slave-trade, §§ 246-251 of the Penal Code. For cases on these sections, see Tucker & Blood's annotated Federal Penal Code, Boston, 1910. An international act analogous to the General Act of 1891 for the suppression of the slave trade, is the protocol signed at Brussels, July 22, 1908, between Great Britain and various other powers prohibiting the importation of firearms, etc., within a certain zone in West Africa. 101 St. Pap. 176.

² *Brig Lawrence* (U. S.) v. Great Britain, Feb. 8, 1853, Moore's Arb. 2824-2825.

³ *Pelletier* (U. S.) v. Haiti, May 24, 1884, Strong, arbitrator, Moore's Arb. II, 1749 *et seq.*

had been committed, whereas he should have applied the Haitian law, which, like the law of the United States (R. S. 5376) defines the slave trade as piracy. Pelletier, having been engaged in the slave trade, was considered not entitled to protection and his punishment having been in no way unusual in view of the heinous character of the offense, Mr. Bayard recommended that the United States decline to enforce the award already made in Pelletier's favor.¹ Lord Palmerston in a letter to Mr. Druet, president of the Swiss confederation, Oct. 16, 1859, stated that a British subject "may so conduct himself either by committing piracy or in other ways as to forfeit all claim to the protection of the British Government."²

§ 351. Violation of Rights of Belligerents. Contraband Carriage, Blockade Running, etc.

The offenses against international law of the second class, punishable not by municipal law but by the state aggrieved by the censurable act are the carriage of contraband, blockade running, resistance to the right of visit and search, or similar violation of a belligerent right. These acts are, of course, only possible in time of war, and the belligerents whose rights are thereby prejudiced have by international law the right to punish them. Neutral states are not bound to prevent their subjects from engaging in the carriage of contraband or in blockade running, and incur no penalty, moral or other. The individual, guilty of the act, forfeits the protection of his national government, and the latter surrenders its subjects to the penalties prescribed by international law and enforced by the belligerent. As a general rule, the penalty is confiscation of the property involved in the act.

The law of prize consists largely of the rules enforced by belligerents against neutral vessels and property violating belligerent interests, from which the national governments of the owners of the property have withdrawn their protection. Holland³ has expressed the principle as follows:

¹ For. Rel., 1887, pp. 606-607.

² *Ibid.*, 1873, II, 1348-1349.

³ Holland, *Studies in International Law*, Oxford, 1898, pp. 124-125. See the British Neutrality Proclamation during the Russo-Japanese War, censuring contra-

"The neutral power is under no obligation to prevent its subjects from engaging in the running of blockades, in shipping or carrying contraband, or in carrying troops or despatches for one of the belligerents; but, on the other hand, neutral subjects so engaged can expect no protection from their own government against such customary penalties as may be imposed upon their conduct by the belligerent who is aggrieved by it."

Presidents of the United States have at various times by proclamation warned citizens of the United States that by carrying contraband they incur the penalty of confiscation and could not receive the protection of the United States.¹ We are not concerned with the various proclamations of presidents, such as the recent proclamations of Presidents Taft and Wilson prohibiting the exportation of arms into Mexico, by which the obligations of neutrals have been increased in the interests of public policy and the peace of contiguous neighbors. Violation of such a proclamation would incur all the penalties of a violation of national law together with a forfeiture of diplomatic protection.²

The origin of the word contraband (*contrabannum*) indicates its unlawful character. Sir Travers Twiss has traced its first use in the treaty of Southampton between England and the United Provinces in 1625.³

We cannot enter here into a complete discussion of the law of contraband.⁴ Confiscation of ship and cargo engaged in such trade is subject to various rules. There is a difference between the Anglo-American practice and the continental practice, although in the Declaration of London (1909) an attempt was made to reconcile the diver-

band carriage by British subjects, criticized in Holland's Letters to the Times upon War and Neutrality. Note in 26 Juridical Rev. (May, 1914), 238.

¹ President Washington in the Neutrality Proclamation, April 22, 1793, Am. St. Pap., For. Rel., I, 140; Pres. Grant in the proclamation of August 22, 1870 in the Franco-German law. On the whole subject of contraband see a recent article by John Bassett Moore, printed in the Proceedings of the American Philosophical Society, v. 51, No. 203, pp. 18-49.

² U. S. v. Chavez, 228 U. S. 525.

³ Twiss, Law of Nations, War, § 121.

⁴ See Bentwich, The Declaration of London, 1911; Westlake, International law, v. 2, ch. 10, Cambridge, 1907; Oppenheim, International law, v. 2, pt. III, ch. 4; Moore's Dig. VII, ch. 26. For an extensive bibliography on contraband, see Hershey, Essentials of International public law, New York, 1912, pp. 504-505.

gencies while continuing the threefold division of Grotius into absolute, conditional, and non-contraband articles. The penalties prescribed by the British Admiralty Manual are as follows:

83. "The vessel which carries [contraband] goods, if not owned by the owner of such goods, is not confiscated but forfeits her freight for such goods and all right to expenses the result of her detention.

85. "The penalty for carrying contraband goods with simulated papers, or in disregard of express stipulations by treaty, is confiscation not only of the contraband goods but also of the vessel, and of any interest which her owner has in the rest of the cargo.

87. "A vessel which is herself contraband is liable to be confiscated, together with such part of her cargo as belongs to her owner."

The vessel is also confiscated if she resists capture or search, or if her owner is privy to the carriage of contraband goods though not himself their owner. In Germany and Denmark the ship may be confiscated if all her cargo, and in France if three-fourths of her cargo is contraband, and according to the Italian maritime code if any part of her cargo is confiscable contraband.¹

The Declaration of London, which was not accepted by Great Britain, has been ratified by a number of continental countries. Its non-acceptance by all the signatories has rendered it ineffective during the European War, although it is constantly invoked as the standard of modern rules. It prescribes the following penalties:

"Contraband goods are liable to condemnation." (Art. 39.)

"The confiscation of the vessel carrying contraband is allowed, if the contraband forms, reckoned either by value, by weight, by volume, or by freight, more than half the cargo." (Art. 40.)

"Goods which belong to the owner of the contraband and which are on board the same vessel are liable to condemnation." (Art. 42.)

The Supreme Court and the Court of Claims have on several occasions dealt with the penalties of contraband. In the case of the *Brig Lucy*,² the Court of Claims laid down the rule that where the owners

¹ Westlake, *International law*, v. 2, pp. 250-251.

² *Brig Lucy v. U. S.*, 37 Ct. Cl. 97; see also the *Schooner Betsy*, 39 Ct. Cl. 452 (where false destination of goods, contraband if destined to belligerent port, innocent, otherwise, justified confiscation); see also *Haigh v. U. S. (The Bermuda)*, 3 Wall. 514; *Carrington v. Merchants' Ins. Co.*, 8 Peters, 495.

of a vessel were the owners of the cargo, the vessel as well as the cargo was subject to confiscation; and where the vessel carrying contraband was falsely documented, or cleared for a false destination, or was guilty of fraud, the liability to confiscation attended the entire voyage, that is to say, from the home port back to the home port and to the cargo on the return voyage, though it might be innocent. If there is no fraud on the outward voyage, such as false destination, or false papers, the carrying of contraband does not affect the condition of the vessel on her return voyage.¹ In one case it was held that where a substantial part of the cargo was contraband, the presumption was that the whole cargo was to aid a belligerent and justified a seizure of the whole.² Knowledge on the part of officers and owners that contraband articles are on board subjects the vessel itself to confiscation.³ A mere false destination of a vessel, where the cargo was innocent and the real destination is a non-blockaded, though belligerent port, does not subject the vessel or cargo to condemnation.⁴ Contraband articles contaminate the whole cargo belonging to the same owner, and all his property on board, contraband and non-contraband, is subject to confiscation.⁵

The penalties of blockade running are in many respects similar to those incurred for carrying contraband. An incident of the operations of a siege is usually the prevention of communication between the besieged place and the outside world. Every attempt of neutrals to cross the line is an interference with a belligerent right and is repressed by the besiegers, without right of complaint by the national government of the blockade-runner.⁶ The Declaration of London prescribes condemnation of the vessel guilty of violation of blockade. The cargo is also condemned, unless it is proven that at the time the goods were shipped the shipper neither knew nor could have known

¹ The *Sloop Ralph*, 39 Ct. Cl. 204.

² The *Schooner Atlantic*, 37 Ct. Cl. 17.

³ *Ibid.*, 39 Ct. Cl. 193.

⁴ *Schooner Betsey and Polly v. U. S.*, 38 Ct. Cl. 30 (provided of course she is properly documented and otherwise carries the indicia of neutrality).

⁵ The *Peterhoff v. U. S.*, 5 Wall. 28, *dictum*.

⁶ Westlake, *op. cit.*, v. 2, ch. IX, 221 *et seq.*; an extensive bibliography on blockade is to be found in Hershey, *Essentials of international public law*, 488.

of the intent to violate the blockade.¹ Knowledge of the blockade itself is an essential element of the offense. Thus, the Declaration provides:

"The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade made in sufficient time to the Power to which such port belongs." (Art. 15.)²

Several cases under the Abandoned or Captured Property Act have brought up interesting points of law in connection with the effect of attempts to avoid capture. In a few early cases, reported principally in volumes 3 and 4 of the Court of Claims Reports, that court held that the purchase of property in immediate danger of capture as lawful booty was in "fraud of the act" and therefore invalid and such property being subsequently captured, the purchaser could not recover the proceeds from the Treasury.

In Klein's case, however,³ the Supreme Court decided that the title to captured property did not pass to and become indefeasible in the United States by capture. The Court of Claims then, following this decision, held their previous decisions erroneous to the effect that the purchase of cotton and other property on the eve of capture was invalid.⁴

Similarly, the colorable transfer or fictitious sale of an American vessel to the British flag in order to prevent its capture by confederate cruisers was held not to operate as a forfeiture of United States protection when the vessel was nevertheless captured by the *Alabama* as an American ship and as property of American owners, because either from the invalidity of the fictitious sale, or as mortgagees in possession, the claimant's property was under the protection of the United States.⁵

¹ Declaration of London, art. 21. See Higgins, A. P., *The Hague Conferences and other International Conferences*, Cambridge, 1909, Renault's Report (accompanying the Declaration), 582.

² Higgins, *op. cit.*, Renault's Report, 578. On the Anglo-American doctrine of constructive knowledge see the *Neptunus* (1799), 2 C. Rob. 110.

³ Klein v. The United States, 13 Wall. 128, 7 Ct. Cl. 240.

⁴ Fernandez v. The United States, 7 Ct. Cl. 541.

⁵ Pike and Stephens *et al.* (case of the *Texan Star*) v. The United States, Act of June 23, 1874, distribution of Geneva Award, Moore's Arb. 2379.

The Supreme Court, however, in the case of the *Benito Estenger*¹ held that the colorable transfer of a ship from a belligerent to a neutral to avoid capture does not relieve her from condemnation as prize. Likewise, the assertion of a false claim by an agent with or without the connivance of the real owner is a substantive cause for condemnation.² Forfeiture to the federal government similarly occurs under the Act of Congress of Dec. 31, 1792, where a vessel sails under a register obtained by false swearing as to the domicile of the owners.³

The Declaration of London provides (Art. 55) that the transfer of an enemy vessel to a neutral flag, effected before the opening of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve. There is, however, a presumption that such transfer is void if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the opening of hostilities. Proof to the contrary is admitted.

"There is absolute presumption of the validity of a transfer effected more than thirty days before the opening of hostilities if it is absolute, complete, and conforms to the laws of the countries concerned, and if its effect is such that the control of the vessel and the profits arising from her employment do not remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the opening of hostilities, and if the bill of sale is not on board, the capture of the vessel would give no right to damages."⁴

Resistance to legitimate visit and search constitutes a good ground for condemnation of a neutral vessel, and operates as a forfeiture of national protection. The Declaration of London provides (Art. 63):

"Forcible resistance to the legitimate exercise of the right of stoppage, visit and search, and capture involves in all cases the condemnation

¹ The *Benito Estenger*, 176 U. S. 568; see also Hall on transfer of vessels *flagrante bello* (4th edition), p. 525. While not generally illegal, a sale during war is in itself a suspicious circumstance, and if not a *bona fide* sale it will not be a defense against capture; see also the *Sechs Geschwistern*, 4 C. Rob. 100; *The Embden*, 1 C. Rob. 20; *The Jemmy*, 4 C. Rob. 31; in France, such sale after outbreak of war is illegal. See *supra*, pp. 255, 483.

² The *Amiable Isabella*, 6 Wheat. 1.

³ The *Venus*, 8 Cranch, 253.

⁴ Oppenheim, *op. cit.*, v. 2, p. 656; Higgins, Report, p. 600 *et seq.*; Bentwich, Declaration of London, 1911, pp. 104 *et seq.*

of the vessel. The cargo is liable to the same treatment which the cargo of an enemy vessel would undergo. Goods belonging to the master or owner of the vessel are regarded as enemy goods."

The Supreme Court and the Court of Claims have had frequent occasion to visit this effect upon a resistance to the right of search.¹ A neutral vessel is, however, justified in defending herself against extreme violence threatened by a cruiser abusing its commission. The rule is not modified by the apprehension of illegal condemnation on the part of the neutral or by the Act of June 25, 1798 which authorizes American merchant vessels to carry arms for protection against French spoliation.² In the case of the Schooner *Jane*³ the Court of Claims held that it could not differentiate degrees of resistance which would render a vessel liable or not liable to condemnation for resisting visit and search.

BREACH OF NATIONAL LAW

§ 352. When Protection Forfeited.

It has been observed that the relation between the state and its citizen is fixed by its own municipal law, and that the citizen abroad remains to some extent subject to the prescriptions of his national law. Yet the principle of territoriality operates to deprive the injunctions and duties imposed upon the citizen of their coercive force at the frontiers of the state. The municipal law cannot be enforced abroad. The state does, however, retain a definite sanction over violations of its municipal law by the citizen abroad, the principal penalty being the loss of protection and sometimes even the loss of nationality, with civil and political rights.⁴

¹ The attempt to elude visit and search forfeits neutral protection. *Maley v. Shattuck*, 3 Cranch, 488; *The Baigorry*, 2 Wall. 481.

² *The Ship Rose*, 36 Ct. Cl. 291; *The Ship Amazon*, 36 Ct. Cl. 378; *The Schooner Jane*, 37 Ct. Cl. 24. See also *Schooner Baigorry v. The United States*, 2 Wall. 474.

³ 37 Ct. Cl. 24.

⁴ Article 17, § 3 of the French Civil Code and German law of July 1, 1870, article 22, prescribe loss of citizenship for the retention by a citizen of a foreign public office after a request by his country to resign it, although in Germany, the deprivation is optional with the state. This principle is retained in the law of July 22, 1913. France, article 17, § 4, amended by the law of June 26, 1889, and Hungary, law of Dec. 20, 1879, article 50 (*Ann. de Lég. Etr.*, 1880, p. 351) prescribe the loss of citizen-

It is, in fact, a general principle of municipal law of all nations that by a disregard or violation of his national law, the citizen assumes all the consequences of his act and forfeits the protection to which normally he might have been entitled. Thus, it has been observed that claims arising out of contracts for services to lobby and to influence Congressional action, transactions obnoxious to the laws of the United States, have been denied diplomatic support.¹ So, as will be seen, violation of the country's neutrality, engaging in prohibited trade, or the violation of an embargo establishing non-intercourse,² involve the loss of the citizen's right to national protection.

Contracts concluded between individuals in violation of the law of the United States, though valid at the place of performance, and, it would seem, even where made, will not be enforced in the courts of the United States.³

§ 353. Waiver of Forfeiture by National Government.

While international commissions have at times deprived a citizen of his standing before the commission for having violated his national law, the decision as to whether and to what extent the citizen shall ship by the taking of military service abroad. See criticism of Von Bar, *op. cit.*, § 59. By the law of Germany (law of July 1, 1870, art. 20) failure to heed the *jus avocandi* in time of war involves a loss of national protection, a provision retained in the law of July 22, 1913. A Costa Rican's acceptance of foreign titles or decorations, except university or philanthropic, involves a similar penalty (Law of Dec. 20, 1886, art. 4, *Ann. de Lég. Etr.*, 1887, p. 869).

¹ *Supra*, p. 717.

² *Brannan (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 2757-2758; *Dennison (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 2766-2767. *Medea and Good Return (U. S.) v. Ecuador*, Nov. 26, 1862, *Moore's Arb.* 2738 (engaging in privateering). See Act of February 28, 1806, Act of Dec. 22, 1807, and Act of March 1, 1809 (the non-intercourse and embargo acts), for a violation of which the commissioners under a convention with France of July 4, 1831, deprived the claimants of the right to national protection. Kane, J. K., Notes on some of the questions decided by the board of commissioners under the convention with France, Phila., 1836, pp. 19-20; also in *Moore's Arb.* 4472. *Thos. Marin (Mex.) v. U. S.*, No. 751, July 4, 1868, *MS. Op. VI*, 161-162 (Mexico had declared certain vessels pirates, and had requested U. S. to arrest them; held Mexico is estopped from claiming indemnity). *English Roman-Catholic Colleges in France v. The Award of the Commissioners for Liquidating British Claims on France*, 2 *Knapp's Rep.* 23 (corporation existing in France for objects in opposition to British law).

³ *Kennett et al. v. Chambers*, 14 *Howard*, 38-39.

by such breach of his national law be deprived of his right to protection lies with his own government and not with the foreign government. So, a disregard of his national laws by an American citizen was held to furnish no warrant to France for a spoliation of his property.¹ Limited protection has at times been extended by the United States to violators of its law abroad, as in the case of the Zerman expedition (*infra*, p. 762) where, in spite of the unlawful character of the expedition against Mexico, the United States insisted and Thornton, umpire, upheld the contention that the United States had a right to demand that their citizens, accused of crimes abroad, should receive a fair trial and reasonable treatment at the hands of the authorities.² In the case of Commodore Danel, who had accepted a privateering commission from Uruguay against Spain in violation of the United States laws and treaties, the good offices of the United States were used to secure his release from detention.³

The violation of national law may, in a case involving diplomatic protection, be entirely waived by the country to which an injured citizen belongs. Thus in several cases before the French-United States Commission of January 15, 1880,⁴ it was argued and held that France may extend its protection to Frenchmen residing abroad in spite of their violation of a decree of France of April 27 (1848) prohibiting the ownership of slaves. In the case of Lake, before the Mexican commission of 1868,⁵ Wadsworth, American Commissioner, in a *dictum*, expressed the opinion that where, by taking military service abroad a citizen has violated his national law, the presentation and support by his government of his claim against the government to whom the services were rendered, raises the presumption that his government had waived the violation of its laws.

¹ Commission of July 4, 1831, Kane's Notes, p. 20. See, however, *English Roman-Catholic Colleges in France v. Award of the Commissioners*, 2 Knapp's Rep. 23.

² *Dennison (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2767.

³ Instructions of Mr. Buchanan, Sec'y of State, to U. S. Consul in Venezuela, footnote in Moore's Arb. 2737.

⁴ *Motte (Fr.) v. U. S.*, Moore's Arb. 2574-2578, and cases of Nougé, No. 323 (Aldis, commissioner, dissenting), Laoreal, No. 97, and Ladmirault, No. 475, cited in Moore's Arb. 2578. The decree went further and even prescribed a loss of "the quality of a French citizen."

⁵ *Lake (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2754.

The violations of national law which will involve a complete or partial forfeiture of national protection are so varied that it seems most convenient to discuss them in classes. We shall treat of these violations, therefore, under the heads of unlawful trade, and unneutral conduct and unfriendly act, with their main subdivisions, privateering, unlawful expeditions, unneutral military service, and unneutral aid and comfort to a belligerent.

UNLAWFUL TRADE

§ 354. Trading with the Enemy.

A state of war interdicts commercial intercourse between enemies. By British and American law the doctrine is upheld that all trading between subjects of enemy states is *ipso facto* prohibited by the outbreak of the war, unless permitted under a custom of war, such as the case of *commerciam belli*, *e. g.*, ransom bills, or allowed under special licenses. In other words, trading between enemies is unlawful unless expressly permitted. The converse of this doctrine to the effect that trading between enemy subjects is lawful unless prohibited by a special order, is upheld by several other countries, for example, Austria-Hungary, Germany, Holland and Italy. The carriage of contraband naturally does not come within this rule.

The Anglo-American rule finds early support in the doctrine of Bynkershoek,¹ and has been maintained by the courts ever since. The rule of the freedom of trade is, however, constantly gaining ground and under modern conditions, unless incompatible with military operations, seems by far the more reasonable rule.²

Reference has already been made to the rules governing contractual relations entered into between subjects of enemy states prior to or during war.³

¹ The Anglo-American view is firmly supported by the courts, and there does not appear any likelihood of a change to more reasonable rules. Scott, Leslie, *Trading with the enemy*, 2nd ed., London, 1914 (includes the British Acts and Orders in Council to October 29, 1914); *The Hoop* (1799), 1 Rob. 196 (Great Britain), and *The Rapid* (1814), 8 Cranch, 156 (U. S.), are the leading cases; Bynkershoek, *Quaestiones Jur. Pub.*, liv. 1, ch. 9 and 15.

² The more liberal view is supported by the majority of modern publicists. See authorities cited in Hershey, *Essentials of international public law*, 367, footnote.

³ *Supra*, § 46.

The rules governing trading with the enemy are matters of municipal law. In countries which regard such trade as lawful, unless specially prohibited, the municipal courts determine for themselves the legality or illegality of a contract of their subject. Thus, Westlake cites the case of the Prussian banker, Güterbock, who during the Franco-Prussian war participated in the Morgan loan to France. The Prussian criminal court held the loan not only illegal but treasonable. Contracts made in the Confederate States for assisting the war against the United States were unenforceable either in the courts of the Confederate States at the end of the war, or in the Union States.¹ The subject of enemy trading has come up frequently before prize courts and municipal courts, and in Great Britain and the United States the law may be regarded as settled.² It will probably be impossible to overcome the effect of these time-honored decisions, and so arrive at a more enlightened rule and practice.

The confiscation of the property of enemies and neutrals engaged in unlawful trade is subject to most complicated rules. We shall here only briefly touch upon those in which the conduct or status of the individual constitutes an important factor in determining the legality of confiscation. The Anglo-American rule of trade domicile which fixes the national character of commercial enterprises by the domicile of the vessel or cargo owner has been applied in determining the confiscability of the property of American citizens and British subjects. Thus, a British subject resident in a neutral country, it has been decided, may engage in trade with the enemy of his own country, but not in articles of a contraband nature, the duties of allegiance traveling with him so as to restrain him to that extent.³

¹ Cases cited in Scott's Cases of international law, 517 *et seq.*, particularly *Wear v. Jones*, 61 Ala. 288; Oppenheim, International law, London, 1912, II, 135 *et seq.*; Westlake, International law, Cambridge, 1907, II, 44 *et seq.*; Hall, International law, 6th ed., Oxford, 1909, p. 385.

² Moore's Dig. VII, 391-395, cites a long list of cases in the U. S. Sup. Ct. and other authoritative opinions.

³ The *Neptunus*, 5 Rob. 409; The *Emanuel*, 1 Rob. 302; The *Ann*, 1 Dodson, 223; *Bell v. Reid* and *Bell v. Buller*, 1 M. & S., 726; *Marryatt v. Wilson*, 1 B. & P. 430. See the modifications inaugurated by the recent British Trading with the Enemy Act printed in Scott, *Leslie, Trading with the enemy* (London, 1914), and in the works by Schuster and Page, *supra*, p. 110.

The British courts have held that commerce by a person resident in the enemy's country, even as representative of the Crown of England, is illegal and the subject of prize, however beneficial to his country, unless authorized by license;¹ but the supply of articles for use of the British fleet was held to be an exception to the rule.² If a British subject employ a neutral to trade for him in the country of the enemy, the neutral is considered to be a mere agent and the transaction is illegal.³

The outbreak of a war usually finds some subjects of each of the enemy states resident in the territory of the other belligerent. It is a general rule that they should be given a reasonable time to withdraw their persons and property from the belligerent soil. The question, however, whether the transaction of withdrawal of their property and its importation into their own country is not in itself an unlawful commercial transaction has created much discussion.

Referring to the view of Vattel and other publicists to the effect that it seems only just that persons so situated should have a reasonable time to withdraw their persons and property and should not be treated as enemies, Duer, the eminent writer on insurance, says:

"It seems a necessary deduction from these views, that, in the judgment of these writers, the property of persons withdrawing themselves from the enemy's country would, in the course of transportation, be entitled to the protection of their own government; since, otherwise, the very object of the lenity exercised toward them might be defeated and that which was granted as a favor would be converted into a snare. To confiscate the property of subjects, in the act of returning to their allegiance, is the extreme of injustice, as well as of impolicy. It is to punish those whom their country should desire to reward."⁴

A distinction is made between a citizen merely *resident* and one *domiciled* in a belligerent state. In the latter case, that of domicile,

¹ *Ex parte Baylehole*, 18 Ves. jun. 538; 1 Rose, 271.

² *The Madonna delle Grazie*, 4 Rob. 195.

³ *The Samuel*, 4 Rob. 284. For cases concerning the unlawfulness of various dealings with residents of the Confederate States during the American civil war, see *the Reform*, 3 Wall. 617; *U. S. v. Weed*, 5 Wall. 62; *The Gray Jacket*, 5 Wall. 342; *The Hampton*, 5 Wall. 372; *The Sea Lion*, 5 Wall. 630; and numerous cases in volumes 2 and 3 of the Court of Claims Reports.

⁴ Duer, *Insurance*, I, 561-563; Vattel, *Droit des gens*, liv. II, chap. 18, § 344; liv. III, chap. 4, § 63; chap. 5, §§ 73-75.

his property involved in war with his own country may be condemned as enemy property; if merely resident, the attempt to withdraw may be similarly penalized, but only on the ground of unlawful trade with the enemy.¹

The question has been raised whether the withdrawal of property from an enemy country for the purpose of bringing it to his own country by a citizen resident in the latter requires a governmental license to relieve it from the implication of voluntary unlawful trading. Duer believes that

“the property of subjects withdrawing themselves in good faith from a hostile country within a reasonable time after knowledge of the war, is not stamped with the illegal character of a trading with the enemy; but it is to be considered, by a just exception from the general rule, as exempt from confiscation.”²

The United States Supreme Court has not passed squarely on the question whether such withdrawal of property from enemy territory within a reasonable time after the outbreak of war constitutes unlawful trading. The *dicta* of Justice Story in the cases of the *Rapid* and the *Mary*³ in the Circuit Court, might lead to the conclusion that he considered such withdrawal unlawful trading. The New York Supreme Court expressed the opinion that a subject of one belligerent may withdraw his property from the territory of the other belligerent, provided it is done within a reasonable time after knowledge of the war and does not involve going to the enemy's country for that purpose. The judge rendering the opinion added that he thought if the question came before the United States Supreme Court such a transaction would be considered as not coming within the policy of the rule which renders all trading or intercourse with the enemy illegal.⁴

Certain British admiralty cases have laid down an exception to the rule which confiscates all goods imported from the enemy's country during the war. This exception covers the case of goods purchased

¹ See Wheaton's Elements of international law, Part 4, Chap. I, § 17; The *Venus*, 8 Cranch, 253.

² Duer, Insurance, I, 564-565.

³ The *Rapid*, 1 Gall. 295; The *Mary*, 1 Gall. 620.

⁴ *Amory v. McGregor*, 15 Johns. 24; see also Attorney General Rush, 1 Op. Atty. Gen. 175.

under an order given prior to the commencement of hostilities, where it was not in the power of the owner, by any diligence, to countermand the order in time to prevent the shipment.¹

The good faith or mistake of the party thus withdrawing his property affords no protection to the vessel or goods engaged in illegal trade with an enemy subject. This was expressly determined by Lord Stowell in the leading case of the *Hoop*, and the rule has since been adhered to.²

§ 355. Prohibition upon Neutral Vessels. Decisions of International Tribunals.

Neutral vessels are equally bound with those belonging to subjects of the enemies to refrain from a trade between enemy ports. Cases of this kind have frequently come before international tribunals for adjudication. In one of the most important of these cases,³ an American vessel during the war between Spain and Mexico sailed from Havana, then a Spanish port, to New Orleans, there shipping additional cargo, and then proceeded to a port in Mexico. So far as the vessel and the Spanish cargo were concerned, this was held to be an unlawful trade and operated as a forfeiture of the vessel's neutral character, giving Mexico, a belligerent, the right to prescribe the penalties which the neutral vessel was to incur.

Various cases of unlawful intercourse and illicit trade occurred during the French occupation of Mexico, in which the property of American citizens domiciled in Mexico was confiscated by Mexican authorities while proceeding from a place occupied by the French

¹ *Juffrow Catharina*, 5 Rob. 141; *The Fortuna*, 1 Rob. 211; *The Freedon*, 1 Rob. 212.

² *The Hoop*, 1 Rob. 196; *The Franklin*, 6 Rob. 127; *Scofield v. Eichelberger*, 7 Pet. 586. The whole subject of trading with the enemy is discussed in Halleck on International Law, 4th ed., ch. 23, II, 143 *et seq.*, from which much of the material of the last few paragraphs has been taken.

³ *The Felix* (U. S.) v. Mexico, Domestic Commission under act of Congress, March 3, 1849, Moore's Arb. 2800-2815; *The Isaac McKim* (U. S.) v. Mexico, Moore's Arb. 2815-2816; *Frear, Cuculla et al.* (U. S.) v. Mexico, Moore's Arb. 2815-2816. As cases in support the commissioners, Evans, Smith and Paine, cite the case of the *Hoop*, Robinson's Admiralty Rep. (1799), I, 298 and *Potts v. Bell*, 8 Term Rep. (1800), 548. See also *Schooner Baigorry*, Renaud, Claimant, v. U. S., 2 Wall. 474. On the general subject, see Halleck, International law, II, 143 *et seq.*

either to another place in Mexico or destined for foreign shipment, a trade prohibited by Mexico.¹

The violation of the embargo and non-intercourse acts of the United States of 1806, 1807 and 1809 was held, by the commission under the treaty with France of July 4, 1831, to deprive the guilty vessel of her right to national protection.²

During the war between Texas and Mexico, American citizens attempted to introduce goods into Mexico from Texas against the Mexican prohibition. They claimed that they were unaware until almost at their destination that a war was in existence,³ but the commission, in disallowing the claim against Mexico for a seizure of the goods, held that the existence of the war at the time of shipment was well known and that the claimants had had time to remove their property.

In these cases protection was forfeited not because of the mere carriage of goods belonging to the enemy, but because of their carriage from or to ports or places, intercourse between which was prohibited. As has been observed, the neutral flag does not cover an illicit trade forbidden to enemies.

§ 356. Licenses.

Mention has been made of the exception from the penalty of confiscation of a trade carried on under the license or protection of one of the enemies. Halleck ⁴ defines a license as follows:

“A license is a kind of safe conduct granted by a belligerent state to its own subjects, to those of its enemy, or to neutrals, to carry on a trade which is interdicted by the laws of war, and it operates as a dispensation from the penalty of those laws, with respect to the state

¹ *Schleining and Pentenreider (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 2818; *Jaroslawsky (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.*, p. 2818, *MSS. Op. VI.* p. 65; *Scott (U. S.) v. Mexico* (traffic between two points occupied by the French in Mexico), *Moore's Arb.* 2817.

² Kane's Notes on some of the questions decided by the board of commissioners under the convention with France of July 4, 1831, *Phila.*, 1836, p. 20, *Moore's Arb.* 2807-2808, 4472.

³ *Forbes and Parker (U. S.) v. Mexico*, *Domestic Commission of March 3, 1849*, *Moore's Arb.* 2666.

⁴ Halleck, *International law*, 4th ed., II, 371.

granting it, and so far as its terms can be fairly construed to extend. The officers and tribunals of the state under whose authority they are issued, are bound to respect such documents as lawful relaxations of the ordinary state of war; but the adverse belligerent may justly consider them as *per se* a ground of capture and confiscation."

Several cases have come before international commissions in which the acceptance by a neutral of an enemy license or the carrying on of trade under the protection of one belligerent was regarded as sufficient reason for the confiscation of the property involved by the other belligerent.¹

The Supreme Court has held that a vessel and cargo liable to capture for sailing under a pass or license of the enemy, or for trading with the enemy, may be seized after the vessel's arrival in a port of the United States and condemned as prize of war. The fault is not purged by the termination of the voyage.²

§ 357. Special Cases of Intercourse with Enemies.

The carrying of a petition to the commander of the French Imperial forces, then at war against Mexico, requesting the release of a certain prisoner, was held not to be such an illicit intercourse as warrants a fine by Mexican authorities for violating the laws of war and bearing communications to the enemy.³

In the case of the *Felix*, the property of an American citizen taken on board at New Orleans was held not subject to confiscation, although the vessel had come with some Spanish cargo from Havana and proceeded, after taking this additional cargo at New Orleans, to a Mexican port, being subsequently captured on the way.⁴

While the establishment of a blockade renders any attempt to break

¹ *Biencourt (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2818-2819 (property of an American citizen domiciled in Mexico seized by Mexico while under French military escort); *Torre and Labordette (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2816; *Scott (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2817.

² *The Caledonian*, 4 Wheat. 100; see also *Castro (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2816.

³ *Johnson (U. S.) v. Mex.*, July 4, 1868, Moore's Arb. 2817.

⁴ *The Felix (U. S.) v. Mexico*, Domestic Commission of Mar. 3, 1849, Moore's Arb., 2815.

it, either by belligerents or neutrals, a just cause for condemnation, an anticipated blockade of the ports of one belligerent by the forces of the other does not interfere with the freedom of neutral commerce, for, said Pinkney, American Commissioner in the Commission under the Jay Treaty¹ "there cannot be a constructive blockade to the prejudice of the trade with neutrals" and, added Trumbull in the same case,²

"it is lawful for a citizen of the United States during the war between Great Britain and France to carry on a trade in provisions between the United States and French possessions in the West Indies, for this is neither inconsistent with the law of nations nor with the duties of neutrality."

The Court of Claims has in a number of cases had to decide whether certain transactions carried on by individuals in the confederate states with aliens, or with American citizens, were unlawful under the non-intercourse act, or the abandoned and captured property act.³

UNNEUTRAL CONDUCT AND UNFRIENDLY ACT

§ 358. Breach of Neutrality.

The breach of neutrality constitutes one of the largest classes of cases in which the protection of the national government is forfeited, in whole or in part. We shall not enter here into an examination of the duties incumbent upon states themselves to observe neutrality in the case of war between two other nations, but shall confine our discussion to such cases of breach of neutrality by an individual as incur either a criminal prosecution under municipal law or the loss

¹ The *Betsey* (U. S.) v. Gt. Brit., Nov. 19, 1794, Moore's Arb. 2839.

² *Ibid*, 2848.

³ *Mayer v. U. S.*, 3 Ct. Cl. 249, to the effect that the collection of ante-bellum debts in the confederate lines was not commercial intercourse with the enemy. Investment by a loyal citizen in the confederate lines in a city captured by Union forces, making the purchaser a resident within the Union lines, took him and the transaction out of the prohibition of the non-intercourse act of 1861; *Furman v. U. S.*, 5 Ct. Cl. 579; *La Plante v. U. S.*, 6 Ct. Cl. 311. To the effect that the non-intercourse act did not apply to purchases of cotton in the disloyal states by an alien resident abroad through an agent, where it does not appear that the agent was appointed, or the means to purchase transmitted, during the rebellion, see *Ensley v. U. S.*, 9 Ct. Cl. 11; 6 Ct. Cl. 282.

(complete or partial) of national protection, or both. The principal cases, in the diplomatic history of nations, in which such protection has been forfeited may be grouped under the headings: Privateering; Unlawful expeditions; Unneutral military or other service; and Unneutral aid and comfort.

(a) *Privateering*

In spite of the fact that most states by treaty or statute have abolished privateering, it is still permissible under the general rules of international law.¹ The Declaration of Paris of 1856, to which Germany, France, Austria, Russia, Prussia, Sardinia, and Turkey were signatories abolished privateering, so far as these countries were concerned.

Opinions differ as to the piratical character of a vessel of a neutral state, armed as a privateer with a commission from one of the belligerents. While the act of privateering is but one step removed from piracy and punishable by the municipal law of most countries when engaged in by nationals, it is admitted by most writers not to be piracy in international law,² although many authors believe that it should be made so.

¹ Austria, Decree of May 25, 1854 prohibits Austrian subjects from using letters of marque, or from any participation in the armament of a vessel, no matter under what flag, and if they infringe this order, they will not only be deprived of the protection of the Austrian government, but punishable by Austria or a foreign state. Spain, the Scandinavian countries, and other governments have frequently issued orders to their own subjects prohibiting them from engaging in privateering against a foreign friendly nation. See Halleck, *International Law*, London, 1908, II, 135.

The Secretary of State of the United States in reply to the notes of the English and French ministers communicating the resolutions of the two allied powers not to authorize privateering said:

"The laws of this country impose severe restrictions not only upon its own citizens, but upon all persons who may be residents within any of the territories of the United States, against equipping privateers, receiving commissions, or enlisting men therein, for the purpose of taking part in any foreign war." H. Ex. Doc. 103, 33rd Cong., 1st sess., cited in Halleck, II, 135.

² Ortolan, *Diplomatie de la mer*, Book 2, Ch. XI; Hautefeuille, *Des Nations neutres*, title III, ch. 2; Abreu, *Tratado de los presas*, pt. 2, ch. 1, §§ 7, 8; Kent, *Commentaries*, I, 100; Phillimore, *International Law*, I, § 358; Klüber, *Droit des gens*, § 260. If not actually piracy the above writers agree that privateering is an infraction of international law.

§ 359. Decisions of International Tribunals.

The effect upon a citizen's protection arising out of an act of privateering against a nation with which his government is at peace was considered at length by several international commissions. In the case of the representatives of Captain Clark, a United States citizen who accepted a privateering commission from the Uruguayan government to cruise against the commerce of Spain and Portugal, with which countries Uruguay was at war and the United States at peace, the facts showed that Captain Clark had captured a Spanish and a Portuguese vessel. Both prizes were seized and taken from him by a public armed ship of Colombia. When Colombia separated into New Grenada, Venezuela and Ecuador, each of these states assumed a certain portion of the debts of Colombia. The claim was presented to the United States-New Grenada Mixed Commission of Sept. 10, 1857¹ and an award made in favor of the claimant, which decision, however, the three commissions which subsequently considered the claim declined to follow. These commissions were the United States-Ecuador Commission of Nov. 25, 1862,² the United States-Colombian Commission of February 10, 1864,³ and the United States-Venezuelan Commission of Dec. 5, 1885.⁴ The decision in each of these arbitrations agreed that Captain Clark, while serving under the flag of Uruguay, must be regarded as a Uruguayan citizen and that for the purposes of his claim his nationality was determined by his commission and by the flag under which he fought. On the question of his breach of neutrality, the following extracts may be quoted:

"It would be against all public morality and against the policy of all legislation if the United States should uphold or endeavor to enforce a claim founded on a violation of their own laws and treaties⁵ and on

¹ Moore's Arb. 1361, 2730.

² *Ibid.*, 2731.

³ *Ibid.*, 2740.

⁴ *Ibid.*, 2743.

⁵ Under the Act of June 14, 1797, citizens, subjects or inhabitants of the United States are strictly prohibited from taking any commission or letters of marque for arming any ship or vessel against Spain on behalf of her revolting colonies. See the *Bello Corrunes*, 6 Wheat. 152. The 14th article of the treaty with Spain of 1795 which prohibits citizens or subjects from taking commissions to cruise against the other includes private armed vessels. See the *Santissima Trinidad*, 7 Wheat. 283.

the perpetration of outrages committed by an American citizen against the subjects . . . of friendly nations. . . . He who engages in an expedition prohibited by the laws of his country must take the consequences."¹

"Considering, however, the light in which privateering expeditions organized in neutral countries are looked upon, the recognition of the right of these parties to claim as American citizens would lead to what would seem a singular and startling result. . . . A foreigner taking part in a contest which did not concern him would be able to invoke first, the assistance of the government which he served and from which he derived his authority, and secondly, if it failed or was unable to obtain satisfaction for him, he might claim the protection and support of his own government in making good his demands, although he had been engaged in defiance of its declarations founded in the clearest obligations of international law in carrying on war against nations with whom that government was at peace."²

"It is just because Clark was a citizen of the United States and in that character committed acts of hostilities against the citizens of another country with which his own government was at peace, that prevents us from considering his claim. It would be very absurd, indeed, to hold that a citizen forfeited his citizenship by a violation of the neutrality of his country, but it is quite true and proper to maintain that no man shall invoke or receive the aid of any court, municipal or international, in recovering the fruits of his own wrongdoing."³

(b) *Unlawful Expeditions*

§ 360. Neutrality Acts of the United States.

The delicate position in which the United States was placed during the wars between Great Britain and France at the end of the eighteenth century and the use which the French sought to make of American territory (relying on the commercial treaty of 1778 with the United States) for organizing expeditions against British commerce and bringing in for adjudication British prizes captured by these vessels, made it incumbent upon our government at an early day to establish the principles of neutrality which have since governed the policy of the United States, a policy which has been followed by Great Britain

¹ Opinion of Hassaurek, United States-Ecuador Commission of 1862, Moore's Arb. 2738.

² Opinion of Sir Frederick Bruce (Gt. Brit.), umpire in United States-Colombian Commission of 1864, Moore's Arb. 2740-2741.

³ Opinion of Findlay (U. S.), Commissioner in United States-Venezuelan Commission of 1885, Moore's Arb. 2748-2749. See Moore's Dig. III, 788.

and which has, indeed, been a most important contributing factor in developing the international law of neutrality.¹ On April 22, 1793, Washington issued his celebrated proclamation of neutrality in which he declared that no citizen would be protected against punishment, or any forfeiture which he might incur under the law of nations by

“committing, aiding, or abetting hostilities against any of the said [belligerent] powers, or by carrying to any of them those articles which are deemed contraband by the modern usage of nations”;

and the important announcement was made that the President had instructed the proper officers to institute prosecutions against persons violating the proclamation. It having been impossible, under the existing law, to convict a certain Henfield for having shipped on a French privateer, the Neutrality Act of June 5, 1795 was passed. Its provisions were continued and elaborated in various acts up to that of April 12, 1818, which act has since been incorporated into the Revised Statutes, §§ 5281 to 5291.

By the terms of these sections of the Revised Statutes a citizen within the United States is prevented from accepting or exercising a commission to serve in war against a friendly nation, or to enlist on an armed vessel of a foreign state (§ 5281); he is forbidden to fit out or arm a vessel with intent to employ it in the service of a foreign state or people (§ 5282); to cruise or commit hostilities against the subjects of a friendly state or people (§ 5283); or to augment the forces of any foreign ship of war (§ 5285); or to begin or set on foot within the United States, a military expedition against a friendly people (§ 5286); and armed vessels leaving the United States are required to give bond that they will not be employed to commit hostilities against the subjects of a friendly state or people (§ 5289). These acts are intended to prevent a citizen from compromising the neutrality of the United States in any way. They do not, however, prevent an individual from leaving the country with intent to enlist

¹ Our early political history in matters of neutrality, with the early statutes and the cases thereunder, is presented by Dana in an elaborate note to Wheaton's Elements of international law, Boston, 1866, note 215, pp. 53 *et seq.* See also Fenwick, C. G., The neutrality laws of the United States, Washington, 1913, ch. II; Moore's Dig. VII, § 1292 *et seq.*

in foreign military service.¹ The British Foreign Enlistment Acts of 1819 and 1870 are equally intended to prevent a violation by British subjects of British neutrality. They have followed closely the terms of the American acts, except that the Act of 1870 apparently prohibits a British subject from taking service under a foreign state or people against a friendly state either within or without the British territory.²

§ 361. Effect of Participation in Unlawful Expeditions upon Protection.

In the diplomatic history of the United States numerous occasions have presented themselves in which it was necessary for the United States to define its position on the effect which the organization in or departure from the United States of unlawful expeditions against friendly peoples or states would have on the protection ordinarily extended to citizens of the United States. The revolutions in Cuba have frequently furnished opportunities for adventurous spirits to organize expeditions in aid of the Cubans, and the internal troubles in Mexico and other Central and South American states have likewise given occasion for the organization of expeditions for the assistance of one or the other of the contending parties.

President Taylor, on being informed that such armed expeditions were being fitted out in the United States, issued in 1849 a proclamation in which he warned

"all citizens of the United States who shall connect themselves with an enterprise so grossly in violation of our laws and our treaty obligations, that they will thereby subject themselves to the heavy penalties denounced against them by our acts of congress and will forfeit their claim to the protection of their country. . . . No such persons . . . must expect the interference of this government in any form on their behalf, no matter to what extremities they may be reduced in consequence of their conduct." ³

¹ *U. S. v. Hertz* (1855), 26 Fed. Cas. No. 15,357; *U. S. v. Nunez* (1896), 82 Fed. Rep. 599; *U. S. v. O'Brien* (1896), 75 Fed. Rep. 900.

² Oppenheim, II, 375, 376.

³ The Proclamation of President Taylor, Aug. 11, 1849, 9 Stat. L. 1003, Richardson's Messages, V, p. 7, cited in Moore's Dig. III, 787-788; see also Proclamation of President Fillmore, April 25, 1851, Richardson's Messages, V, p. 111, Moore's Dig. III, 788. The principle announced has since been greatly modified; see Proclamation of President Cleveland, 1895, Richardson's Messages, IX, p. 591. On the

As will be noted, while diplomatic protection is to some extent forfeited by transgressors of the kind referred to in the proclamation, they are still protected against violent invasion of their rights of trial or against cruel and inhuman treatment. While the neutrality acts of Great Britain and the United States already impose upon these countries greater obligations than international law requires, the President of the United States has on several occasions by special order still further increased the duties of the United States by forbidding the exportation of arms to disturbed areas, considering such an act as a breach of neutrality.

These orders have been promulgated in the case of countries in close proximity to the United States, the disturbed condition of which may constitute a menace for the United States, the orders being justified upon the same grounds which support intervention under similar circumstances. Thus, the joint resolution of March 14, 1912, introduced in the Senate by Mr. Root, authorizes the President to forbid in his discretion the exportation of arms or munitions of war to American countries in which he shall find conditions of domestic violence to exist, and declares that any shipment of such material made after the issue of the President's Proclamation "shall be punishable by fine not exceeding ten thousand dollars or imprisonment not exceeding two years, or both." On the same day, the President issued the proclamation provided for in the resolution by declaring formally that "conditions of domestic violence promoted by the use of arms or munitions of war procured from the United States as contemplated by the said joint resolution" do in fact exist, and he warned all persons that violations would be rigorously prosecuted.¹

This takes out of the category of lawful commercial enterprises, under the exceptional circumstances mentioned, a transaction hitherto regarded as perfectly legitimate. There is now a general movement to further increase neutral obligations by preventing money from being supplied to belligerents by citizens of neutral countries, not to

law of hostile military expeditions, written principally from the point of view of the responsibility of the state therefor, see R. E. Curtis in 8 A. J. I. L. (1914), 1-37, 224-255, reprinted as a Wisconsin doctor's dissertation.

¹ 37 Stat. L. 630; U. S. v. Chavez, 228 U. S. 525; Fenwick, *op. cit.*, 58.

mention the agitation, stimulated by the European War, for prohibiting completely the export of arms and munitions of war.

§ 362. Cases before International Tribunals.

Several cases of unlawful expeditions which have occurred in the diplomatic history of the United States have come for adjudication before international tribunals. In one of the most important of these cases, certain American citizens purporting to act in the interests of a revolutionary party in Mexico entered into an agreement with one Zerman, an officer of the French navy, to take command of an expedition to sail from San Francisco on a vessel purchased by them. A vessel and arms were purchased from American citizens, passengers and freight solicited, and a crew which had knowledge of the expedition placed on board. Three days after sailing the warlike nature of the enterprise was fully revealed by Zerman appearing in a Mexican uniform, the English flag being lowered and the Mexican hoisted in its place. Some of the passengers had no guilty knowledge of the nature of the expedition until that time. The vessel while on the way to Mexico chartered an American whaling ship with her captain and crew. On arrival at Mexico, she was seized, the passengers and crew arrested and, under harsh circumstances, marched to the interior and subjected to great cruelty.

Claims were brought on behalf of the owner of the first vessel, of the person who supplied the arms, of the crew, of the passengers, of the owner and captain of the chartered vessel, and others. It was held by Thornton, umpire of the 1868 commission with Mexico, that those who had guilty knowledge of the purpose of the expedition could not receive the protection of the United States in recovery, certainly so far as the seizure of the vessel and goods was concerned. This decision applied to the owner of the original vessel, the *Archibald Gracie*,¹ and to the person who had furnished the arms and ammunition for the expedition,² as well as to passengers who had guilty knowledge

¹ *Dennison (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2767.

² *Gros (U. S.) v. Mexico*, Moore's Arb. 2771. This was, however, *dictum*, inasmuch as Thornton held that Gros had not acquired United States citizenship, and dismissed the claim on that ground.

of the nature of the expedition,¹ or who, by ignorance, showed an absence of prudence.² In these cases, however, in spite of the culpable conduct of the claimant, the umpire allowed sums, "the lowest possible amounts," as he said, for the unnecessary and illegal delay in proceeding with their trial and for the harsh treatment imposed upon them by the Mexican authorities. In the case of innocent passengers having no knowledge of the nature of the expedition, compensation was allowed for their property seized. The owner of the second vessel, the *Rebecca Adams*, which had been chartered by her captain to Zerman without the owner's knowledge, was held entitled to the full value of the vessel, as the Mexican authorities had not released it within a reasonable time.³ The captain of that vessel, the umpire held, should have known the illegal nature of the expedition, but damages were awarded for his loss of private property and for harsh treatment and illegal delay in trial,⁴ the umpire taking account, in reducing the damage, of his indiscretion in chartering the vessel to Zerman. The officers and crew of the chartered vessel were compensated for the loss of private property as well as for harsh treatment and illegal delay in trial.

The Spanish-United States Mixed Commission of Feb. 12, 1871 dealt with the case of the *Mary Lowell* which had cleared from New York in 1869 for a Mexican port, but actually carried a cargo of munitions of war for the insurgents in Cuba. She was abandoned at the Bahamas by her captain and crew and suffered by her captain to come into the possession of parties interested in promoting the Cuban cause. While leaving the British port she was seized by a Spanish vessel taken to Havana, and condemned as prize. Baron Blanc (Italy), the umpire, admitted that she had been captured by the Spanish forces in violation of international law, yet, said he:

"As the cargo consisting of arms, ammunition, and other military supplies, was admittedly intended by its owner . . . for the benefit of insurgents against the Spanish government, and as the brig was allowed [by her captain] either willfully or negligently, to fall into the

¹ *McCurdy (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 2769.

² *Dolan (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2767-2768.

³ *Cootey (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2770.

⁴ *Andrews (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2769-2771.

hands of parties actively interested in promoting the insurrection, the claimants forfeited their right to the protection of the American flag, and are estopped from asserting any of the privileges of lawful intercourse in times of peace and any title to individual indemnity as against the acts of the Spanish authority done in self-defense."¹

On the rehearing of the case the umpire held that the infraction of international law by Spain was a matter between the United States and Spain to settle, but that the claimant himself by his unlawful act was estopped from pleading Spain's violation of international law.² The capture of the *Virginus* (*infra*) on the high seas was treated by the United States as a national affront to the American flag, even though her flag and registration were "a fraud upon the navigation laws of the United States."³

In the case of Wyeth and Speakman before the Spanish-United States Commission,⁴ claimants had landed in Cuba with an armed expedition, were taken prisoners by Spain, and summarily executed. It was contended by the United States that they were entitled to a fair trial according to the usages which had obtained currency among civilized states under martial law, and that the question of their innocence or guilt was for this purpose irrelevant.⁵ The umpire, Bartholdi, held, however, that the claimants having "left the United States with an expedition intending to invade the island of Cuba" and having landed there, they had "no right to recover damages from the government of Spain." Their execution was apparently justified on the ground that Spain could properly consider them public enemies, but

¹ Campbell and Arango, captain and owner, respectively, of the Brig *Mary Lowell* (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. 2772-2777; Moore's Dig. II, 983-984.

² The claimant in the case of Clark (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 2749 was held equally estopped from pleading the unlawful character of the seizure of his prizes, when he must have violated the neutrality and the laws of the United States and its obligations in accepting and acting under the privateering commission by virtue of which the captures were made.

³ Williams, Atty. Gen., 14 Op. Atty. Gen. 340.

⁴ Wyeth and Speakman (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb., pp. 2777-79.

⁵ Mr. Webster, Sec'y of State, to Mr. Thompson, Minister to Mexico, April 15, 1842 in the case of the Santa Fé Expedition, 6 Webster's Works, pp. 427, 437; Lieber's "Instructions for the government of the armies of the United States in the field"; Scott's Digest of military law (1873), pp. 441 *et seq.*, cited in Moore's Arb. 2778; see also Moore's Dig. III, 787.

even then they should have received a fair trial. Perhaps the umpire was influenced by the sweeping terms of President Taylor's proclamation in 1849. At all events, the case may be regarded as extreme, and not supported by the weight of authority.

§ 363. Executive and Judicial Rulings.

The United States and the British government have not accepted the view that a foreign government has the right to inflict arbitrary punishment upon their nationals engaged apparently in a hostile expedition against it, although the United States has declined to present claims for the capture of a vessel engaged in transporting an unlawful expedition, notwithstanding the innocence of the owner.¹

In the case of the *Virginius*, this ship had by fraud obtained American registration. She was captured on the high seas, while flying the American flag, by a Spanish war-vessel, for carrying arms and ammunition to insurgents in Cuba. She was taken to Santiago, Cuba, and fifty-three of her crew and passengers, including British subjects, Americans and Cubans, after summary trial by court-martial, on the charge of piracy, were executed. In spite of the unlawful character of the expedition, both the United States and Great Britain demanded and secured for their injured citizens and their families a large indemnity, not because of the seizure of the vessel or detention of the passengers and crew, but because it was the duty of the Spanish authorities to prosecute the offenders in proper form of law, and to have instituted regular proceedings on a definite charge before the execution of the prisoners, and because Spain, although competent to apply the term "piracy," by its municipal laws, to various offenses other than those deemed piracy by the law of nations, could not, simply by applying the term, subject them to the penalties incurred by piracy under the law of nations.²

It has been observed that commercial adventures are not prohibited

¹ Mr. Fish, Sec'y of State, to Mr. Buchanan, March 30, 1869, Moore's Dig. VII, 872 (case of the *Georgiana*, captured by Spain while engaged in the Lopez expedition to Cuba).

² The *Virginius*, Moore's Dig. II, 895 *et seq.*, 964-968, 980-983; Hall, *op. cit.*, 6th ed., 262, 270. See also the case of the *Competitor*, Moore's Dig. VI, 123, 786.

by the neutrality laws, even when they consist in the sale of a fully armed vessel in a port of the United States or bound for a foreign port for sale, or in the sending of arms and munitions of war, by an individual, as merchandise, to an individual in or government of a belligerent country. The line between a commercial transaction of this kind and an unlawful expedition under the Revised Statutes (§ 5283) is often a narrow one and the solution of the matter turns on the question of *intent*. The fitting out and arming of the vessel must be coupled with the intent to employ her to cruise or commit hostilities against the subjects or property of a friendly state or people in order to bring her within the penalties of the United States neutrality acts.¹ Of course, the shipment of arms and munitions of war subjects the property to the usual penalties of contraband, namely, confiscation by belligerents.

Lord Granville during the Carlist war of 1873 pressed for the restitution of two British steamers seized on the high seas by the Spaniards on suspicion of conveying arms to the insurrectionists. As the insurrectionists had not been recognized as belligerents, the capture was considered unlawful by the British minister, who demanded release of the vessels. On application by the owner to Lord Granville for redress on account of losses, he was told that when British subjects enter into speculation such as that in which these vessels were employed, they must not look to the British government for compensation or support if the expedition prove disastrous. Baty adds that it is a little curious why Great Britain interfered at all.²

(c) *Unneutral Military Service and Other Acts*

§ 364. Qualified Loss of Protection.

The United States neutrality laws do not prohibit its citizen from going abroad and there enlisting in the military service of a belligerent. The penalty imposed is simply a loss—and usually not a complete loss—

¹ The *Meteor* (1866), 17 Fed. Cas. No. 9,498; The *Itala* (C. C. A.), 1893, 56 Fed. Rep. 505; The *Laurada* (1898), 85 Fed. Rep. 760; The *Conserva* (1889), 38 Fed. Rep. 431; 5 Op. Atty. Gen. 92.

² The *Queen of the Seas*, and The *Deerhound*, 65 St. Pap. 446, 513, 579, 725, cited and paraphrased in Baty, International law, 162.

of the right to national protection. The neutrality laws simply prevent the acceptance or exercise of a foreign commission, or service to a foreign people or state, within the United States, or illegal expeditions departing from the United States or organized within the United States for such service. The British Foreign Enlistment Act of 1870¹ provides the penalty of fine and imprisonment for any person who

“without the license of Her Majesty, being a British subject, within or without her Majesty’s dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty.”²

It has already been observed that the state owes no duty to other states to prevent its subject from going abroad to enlist in a hostile army. But if he does, he may incur certain penalties, which may be prescribed by the municipal law of his own state and which it may enforce as it deems proper. Usually, such service constitutes a violation of his national neutrality laws, and he incurs, besides, a partial loss of national protection. We say partial because if the citizen found in arms against a foreign government is subjected to unusual punishment by the foreign government, his own government will interpose to secure a mitigation or amelioration of the hardship, provided, of course, that he has not, by an unqualified oath of allegiance, expatriated himself. Secretary of State Webster expressed the status of individuals so found in arms against a foreign state, as follows:

“It is still the duty of this government to take so far a concern in their welfare, as to see that, as prisoners of war, they are treated according to the usages of modern times and civilized nations.”³

Should the citizen be killed in battle every possibility of claim is extinguished with him. He has by his unneutral conduct taken his life

¹ 33 and 34 Vict. (1870), Ch. 90, § 4.

² N. W. Sibley, *The neutrality of Great Britain; The Foreign Enlistment Act* (1870), 29 *Law Mag. and Rev.* 454-467; 30 *ibid.* 37-53. To effect that mere military service abroad does not denationalize, see *Stevenson (Gt. Brit.) v. Venezuela*, *Ralston*, 438, 454.

³ Webster’s Works, VI, 436, see paraphrase in Moore’s Dig. III, 787; Mr. Fish, Sec’y of State, to Mr. Williams, July 29, 1874, *For. Rel.*, 1874, 300. See also papers of Theodore S. Woolsey and Arthur K. Kuhn in *Proceedings of the American Soc. of Int. Law* (1910), 99 *et seq.*, 110 *et seq.*, and E. P. Wheeler in 3 A. J. I. L. (1909), 880.

into his own hands. Should he, however, be taken prisoner, he must be treated according to the rules of war, and his national government will, according to precedent, enforce his rights in this respect.

The position of an alien serving with revolutionists to overthrow the government presents a delicate problem, in which the United States has several times been involved. It ought to be clear that if captured by the titular government he is subject to severe penalties, perhaps even more severe than those visited upon natives, for he was purely a mischief-maker and probably not fighting for patriotic reasons. If the punishment is fair and not violative of the rules of war, his national government will not interpose. Likewise, if his punishment is no greater than that inflicted on natives or on other aliens, his government will usually abstain from interfering. Only in three cases will his government manifest a protective interest in his behalf: (1) if his treatment has been inhuman; (2) if, while captured in an organized rebel army, the rules of war have been violated to his prejudice; (3) if he is discriminated against on account of his nationality as against other aliens. Professor Woolsey has concisely expressed the general rules governing an alien aiding an insurrection against the established government of a friendly state:

“(1) He is liable to all the risks of the situation on a par with the native;

(2) He may perhaps even be discriminated against because less excusable than the native;

(3) Yet by his treatment humanity must not be violated;

(4) Nor may he stand on a worse footing than other aliens, although self-defense will justify a good deal of severity.”¹

This question was squarely presented in the case of Cannon and Groce, two American citizens captured in 1909 by the Nicaraguan president Zelaya while holding commissions as officers in the service of the forces of Estrada, unrecognized revolutionists. They were summarily executed, apparently without any kind of a fair trial. This outrage called forth from Secretary of State Knox a vigorous note in which he expressed the intention of holding “personally responsible the men who were to blame for the torture and execution” of these citizens, whatever that may mean. It is clear from this and other

¹ Proceedings of the American Soc. of Int. Law (1910), 103.

cases that an alien taking up arms against a friendly state retains a large measure of his national protection. In the Cannon case, while the citizen was disloyal to the United States in fighting against the established government in Nicaragua, his government still insisted upon his being accorded the treatment of a prisoner of war.¹ Protection in such cases usually takes the form of an amelioration or mitigation of harsh or extraordinary punishments. There is much to be said, however, for the view that when American citizens so completely identify themselves with a foreign state and its domestic affairs as to fight with rebels in violation of their natural obligations as neutrals, they forfeit all claim to the protective interest of their national government,² a principle recognized in the protocol for the settlement of the Santos claim against Ecuador by the admission that claimant lost his standing if he had been "guilty of such acts of unfriendliness and hostility to the government of Ecuador, as, under the law of nations, deprived him of the consideration and protection due to a neutral citizen of a friendly nation."³

The United States will generally not interpose to secure money damages for a citizen who has violated its neutrality laws. As Secretary Bayard expressed it: The Department of State will not present to a foreign government a claim based on transactions involving a violation of the neutrality of the United States.⁴ American citizens who implicate themselves in foreign revolutions have a very weak title to national protection, valuable only to prevent a flagrantly harsh violation of their persons through unusual forms of punishment.

When Don Miguel's government was overthrown in Portugal in 1833 one of its generals, Sir J. Campbell, a British subject, was captured in a British vessel bearing Miguelist dispatches. On invoking British protection, Lord William Russell declared the general rule: "when

¹ 4 A. J. I. L. (1910), 674-675; Sec'y Knox's note in Supplement (1910), p. 249.

² See Baty in 35 Law Mag. & Rev. (1910), 205-206. The British government appears to have exercised its good offices in several cases, appealing to the grace of the foreign government. *Ibid.* 206.

³ Santos v. Ecuador, Feb. 28, 1893, Moore's Arb. 1584 *et seq.*; Moore's Dig. III, 756; La Fontaine, 450.

⁴ Mr. Bayard, Sec'y of State, to Messrs. Morris & Fillette, July 28, 1888, Moore's Dig. VI, 623.

a military officer serves another sovereign his allegiance is to that sovereign, and his rights as an Englishman cease." Lord Palmerston concurred in the opinion but remonstrated mildly on Campbell's continued close imprisonment as contrary to the usage of war.¹

In the case of Nolan before the British-American Commission of 1871,² an award was made in spite of the proven unneutral conduct of the claimant because the prison in which he was detained was wholly unfit for use and his treatment at times harsh and cruel.

Secretary of State Webster in 1842 stated that a citizen engaged as a combatant in a foreign country, captured by the other belligerent within its jurisdiction, forfeits the protection of his own government,³ a principle which must probably be understood within the limitations above expressed. Mr. Fish, referring to a steamer chartered by an American citizen to the Haitian government as an auxiliary to military operations for the suppression of an insurrection against Haiti, stated that such a vessel

"must be regarded as relying exclusively upon the protection of that power, and [as] abjuring, while such employment continues, any claim to the protection of the United States."⁴

Provided the citizen thus engaged is not suffering from or threatened with an extraordinary or unusual punishment or hardship, this view is not incorrect.

Secretary of State Sherman in stating that the United States could not interfere to compel the employing government of Guatemala to pay for the services of a vessel voluntarily carrying arms and troops for such government while trying to put down an insurrection added:

"it would leave the vessel and its crew so voluntarily entering into such service to the consequences of establishing such a relation."⁵

The service of an American vessel in the transport service of Great Britain during her war with France, the vessel being chartered to carry

¹ 23 St. Pap. 1263, cited by Baty, *International law*, 98-99.

² Nolan (*Gt. Brit.*) *v.* U. S., May 8, 1871, *Moore's Arb.* 3302; *Hale*, 79.

³ Mr. Webster, Sec'y of State, to Mr. Peyton, Jan. 6, 1842, *Moore's Dig.* III, 787.

⁴ Mr. Fish, Sec'y of State, to Mr. Bassett, Sept. 15, 1869, *Moore's Dig.* II, 1073. See also Mr. Foster, Sec'y of State, to Mr. Scruggs, Sept. 30, 1892, *ibid.* 1075.

⁵ Mr. Sherman to Mr. Coxe, April 21, 1897, *For. Rel.*, 1897, p. 332.

supplies to the British garrison in the West Indies, justified her seizure and deprived her of American protection.¹

Expulsion is not an extraordinary penalty for a foreigner taking part in an insurrection and the United States has in such cases declined to relieve a citizen charged with aiding and abetting an insurrection from such a penalty.² The expulsion must, however, be carried out without unreasonable severity.³

Service in a revolution involves all the attendant risks of such service. As was said by the commissioners of 1849 in the Atocha case:

"He may not assist or involve himself . . . in the revolution of a country without incurring the responsibility and sharing the fate of those with whom he acts."⁴

¹ Under the treaty of 1800 between the United States and France a cargo took its national character from the flag under which it was carried; free ships making free goods, and enemy ships making enemy goods. But when that treaty expired the general law of nations obtained as between France and the United States, according to which the property of an enemy is under all circumstances a legitimate object of seizure and confiscation. Under international law the property of the neutral would not be affected by its association with that of a belligerent, and an American non-contraband cargo seized in British bottoms by the French was restored. Kane in his notes on the questions decided by the commissioners under the convention with France, states that the exceptions to this rule were due to the misconduct of a neutral, as, for example, where he endeavored to mask the property of an enemy by commingling it with his own, or by otherwise investing it with a neutral garb, in which cases he forfeited his national claim to immunity. He cites the case of a Swedish ship which, having been purchased by an American, entered a French port, France being then at war with Sweden, and simulated American papers to protect her from capture as an enemy. The American cargo which she carried was held justly liable to condemnation. Kane's Notes, Phila., 1836, pp. 49-51. See also *Darby v. Erstern*, 2 Dall. 34.

² Mr. Hay, Sec'y of State, to Mr. Powell, Min. to San Domingo, May 1, 1902, For. Rel., 1902, pp. 382-383.

³ Hollander case against Haiti, For. Rel., 1895, II, 775 *et seq.*

⁴ *Atocha (U. S.) v. Mexico*, Opin. of Domestic Commission under Act of March 3, 1849 referred to in Moore's Arb. 1264, but not reported; *Di Caro (Italy) v. Venezuela*, Feb. 13, May 7, 1903, Ralston, 769. But the claimant's government, even where there is such censurable conduct, will not tolerate a cruel or unusual punishment or an unfair trial. For the policy of Great Britain in this regard, see the Earl of Clarendon to Acting Consul Barbar *In re* seizure of steamer *Cagliari* by the Sicilian government, charged with aiding revolutionists. Two British subjects on board were imprisoned. While local jurisdiction over them was admitted, the right to counsel, to a fair trial, and to customary imprisonment was insisted on. For failure

Numerous cases have come before international commissions in which American citizens have claimed compensation for military service rendered to foreign governments. The decision in most of these cases has followed the principle laid down in the case of Dimond against Mexico before the Domestic Commission under the act of March 3, 1849:¹ "When citizens of the United States leave their own country and enter into the service of another, they thereby voluntarily renounce their allegiance and with it relinquish their right to the protection of the government under which they were born," although, as has been observed, under the municipal law of the United States, military service abroad, not accompanied by an unqualified oath of allegiance, does not amount to expatriation.

In the case of Young,² before the Domestic Commission of 1849, the Commissioners in rejecting a claim for military service said:

"For the United States to press the claim of one of its citizens against a foreign government for compensation for military service, would constitute a violation of the principles of neutrality."

As the Mexican law provided that persons entering its military service thereby acquired Mexican citizenship, the statute was in several cases given effect as conferring Mexican citizenship *pro tempore* during the time of the service, thus depriving the claimant of his standing as an American citizen.³ While the individual could, held the commissioners, by a return to his own country restore his national character, he lost the benefits of his American citizenship during his foreign to comply with these conditions, Great Britain demanded and secured an indemnity of £3000, 48 St. Pap. 351, 354; see also Baty, International law, 118.

¹ Dimond (U. S.) v. Mexico, Feb. 2, 1848, Act of Mar. 3, 1849, Moore's Arb. 2386; Robinson (U. S.) v. Mexico, Mar. 3, 1849, *ibid.* 2389; Wallace (U. S.) v. Mexico, July 4, 1868, *ibid.* 3474; Lake (U. S.) v. Mexico, July 4, 1868, *ibid.* 2754 (Op. of Wadsworth, Commissioner). A similar decision was made by the Spanish Treaty Claims Commission in the cases of Jova, No. 122, and Caldwell, No. 283, American citizens who had served with the Cuban insurgents against Spain. Explanatory Notes in Briefs, XXIV, 126.

² Young (U. S.) v. Mexico, Mar. 3, 1849, Moore's Arb. 2753; Meyer (U. S.) v. Mexico, March 3, 1849, *ibid.* 2390.

³ Martin (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2467; Greene (U. S.) v. Mexico, July 4, 1868, *ibid.* 2756. The U. S. has recognized the validity of a foreign law conferring naturalization upon an American citizen enlisting in a foreign army. *Supra*, p. 711.

service.¹ In one case where the claimant, having served in the Mexican army as an officer and instructor of military tactics, had given up his service and started to return to the United States, when he was robbed of money by a Mexican soldier, Commissioner Wadsworth, in the commission of 1868, held that while he could return and re-establish his rights as an American citizen

“he must have persevered in his intention until the change [of domicile] was *effectuated*, and not having actually returned before the injury took place, he was not entitled to diplomatic protection.”²

The strength of the bond of allegiance was in many cases either underestimated or overestimated before the expatriation act of 1868 and before the policy of the United States became fixed. Those decisions of the commission of 1849 which penalize service abroad with a loss of citizenship must be understood at most in the sense of a *temporary* loss of protection during the continuance of the service. An early decision in the United States Circuit Court went to the other extreme and held that an American citizen may enter the land or naval service of a foreign government without divesting himself thereby of his rights of citizenship.³ This must be understood in the narrow sense of full legal citizenship, which is not perhaps forfeited, although it is certain that many incidents of citizenship, including the right of protection, are, by such unneutral service, seriously impaired.

The general principle of a forfeiture of protection by military service abroad was somewhat modified, in the case of certain claims against Mexico arising out of military service rendered to her, by the fact that Mexico had in 1825 acknowledged a liability for such service. Thus, in the cases of Porter and McRae before the Domestic Commission of 1849, the commission stated:

“This new obligation was not obnoxious to the objection which vitiated the claim arising out of the original contract and has since been recognized as valid and binding upon that government (Mexico).”

After stating that the commission under the convention of 1839 had recognized these claims as valid, they added:

¹ Young (U. S.) v. Mexico, Mar. 3, 1849, Moore's Arb. 2753.

² Monstery (U. S.) v. Mexico, Op. I, 38, referred to in Moore's Arb. 2467.

³ The *Santissima Trinidad*, 1 Brockenbrough, 478, decision by Marshall.

"The validity of the claims against Mexico based upon the obligation of 1825 has been recognized by the Court of Appeals of Maryland in the case of Gill, trustee, *v. Oliver et al.*"¹

The neutrality of a nation in a war waged by other powers, renders obligatory, according to international law, the observance of neutrality by all its citizens, however difficult it may be for its government to enforce by municipal statutes a conformity by individuals with the duties thus assured by it.

The case of Whitty,² a subject of Great Britain who had rendered service to the Confederate army and sought exemption from the penalties of his unneutral act by showing that he had resigned such service when he learned of the proclamation of Her Majesty enjoining neutrality upon her subjects in the Civil War, gave the arbitral commission under the protocol of May 8, 1871, occasion to state that the obligations of neutrality of an individual are dependent upon the attitude of his nation and that the claimant was bound to neutral duty *before* Her Majesty's proclamation; and moreover that a pardon granted by the President restoring to those participating in the Rebellion their rights of property, excepting "property which may have been legally divested under the laws of the United States," as had been the property of this unneutral foreigner, did not relieve claimant from the taint of unneutrality.

Under the protocol between the United States and Costa Rica which provided that

"no claim of any citizen of the United States who may be proved to have been a belligerent during the occupation of Nicaragua by the troops of Costa Rica, or the exercise of authority, by the latter, within the territory of the former, shall be considered as one proper for the action of the board of commissioners,"

it was held by the umpire, Bertinatti (Italy), that a person who removed the greater part of his merchandise on the approach of the

¹ Gill, Trustee, *v. Oliver, et al.*, 11 Howard, 529. See *Mercantile Ins. Co. (U. S.) v. Mexico*, Moore's Arb. 3429; *Meade (U. S.) v. Mexico, ibid.* 3430; *Porter and McRae (U. S.) v. Mexico, ibid.* 2390.

² Whitty (Gt. Brit.) *v. U. S.*, May 8, 1871, Moore's Arb. 2883. For the neutral duties incumbent upon the subject of a neutral nation, see Opinion of Bruce, umpire in the case of *La Constancia, etc. (U. S.), v. Ecuador*, Feb. 10, 1864, Moore's Arb. 2741.

Costa Ricans to a city held by the Nicaraguans and took refuge on board a Nicaraguan vessel was a belligerent;¹ and that inasmuch as a certain corporation had shown its complicity with certain filibusters in Nicaragua, the corporation and the captain of one of its vessels were "belligerents" under the protocol.²

Notwithstanding the proclamation of Presidents Taylor and Fillmore and the declaration of secretaries Webster and Fish, quoted above, it is now certain, as recent practice confirms, that American citizens taking military service abroad against a friendly state do not completely forfeit all right to their national protection. In the case of a number of American citizens who had served with the Boers and had been taken prisoners by the British troops in the South African war, Secretary of State Hay addressed a note to our ambassador in London, Mr. Choate, stating that some of these prisoners had been confined in the unhealthy climate of Ceylon and asked their removal to a more healthful place. Mr. Hay added:

"The government of the United States could not view without concern the risk of life and health involved in sending any unacclimated citizens, taken under the circumstances described, to so notoriously insalubrious a place as the Island of Ceylon. The principles of public law which exclude all rigor or severity in the treatment of prisoners of war beyond what may be needful to their safety imply their nonsubjection to avoidable danger from any cause."

The United States, in the case of these and other prisoners sent to St. Helena and other military stations, made several attempts to secure their release and sought to make arrangements for their transportation home or to other favorable places. The men were finally sent to the United States at the expense of Great Britain.³

While governments therefore, as has been observed, will admit that their citizens, engaging in military service to foreign governments, are subject to capture and treatment as prisoners of war, they insist that such imprisonment shall not be violative of the rules of war and

¹ Bowley (U. S.) v. Costa Rica, July 2, 1860, Moore's Arb. 1567.

² Accessory Transit Co. (U. S.) v. Costa Rica, July 2, 1860, Moore's Arb. 1558; Hoover (U. S.) v. Costa Rica, July 2, 1860, *ibid.* 1567.

³ For. Rel., 1902, pp. 463-497 (Mr. Hay's note is dated Oct. 16, 1900).

shall not be unreasonably harsh. The decision in the Wyeth and Speakman case (*supra*, p. 764) may be regarded as dependent upon other elements in that case, and at all events no authority against the rule here expressed.

§ 365. Claims for Military and Other Service.

Notwithstanding the general rule of the United States that the claims of its citizens for military service rendered to foreign governments or for military pensions will not be supported, Great Britain does not appear to have adopted such a rule. Thus, Great Britain in 1873 successfully urged a claim of one of her subjects arising out of military service rendered to Brazil by claimant's father, Lord Cochrane, during Brazil's war of independence.¹ In the Lake case, the services rendered by the claimant to Mexico² were acknowledged by Palacio, the Mexican commissioner, as a just claim against Mexico, but on the whole the decision may be regarded as exceptional, and not based upon law, but on the equitable views of the Mexican commissioner. Similarly, by way of exception, the special acknowledgment by Mexico of debts for services rendered, was held to justify awards, by the Mixed Commission of 1839 and the Domestic Commission under the Act of March 3, 1849, on claims arising out of military service of American citizens rendered to the Mexican government.

In spite of the general rule that military service by a citizen abroad to a foreign country entails (within the limitations mentioned) a forfeiture of national protection, Earl Russell held, in the case of a British subject who had served in the Confederacy, that when British protection is demanded by such an individual in a third country (Mexico) it ought not to be withdrawn from him.³

Service of various kinds, rendered to a foreign government, has been held to be violative of the claimant's neutrality, even where it was not strictly military service. Thus, work done in the building and repairing of Peruvian vessels by a United States citizen, while Peru was at war with Spain and at peace with the United States, was

¹ Dundonald (Gt. Brit.) v. Brazil (1873), Moore's Arb. 2107-08.

² Lake (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 2754.

³ Earl Russell to Mr. Scarlett, June 1, 1865, For Rel., 1873, II, p. 1342.

considered unneutral service,¹ and barred a claim against Peru. So, the fact that an American citizen in the course of a war between France and Mexico took charge, for Mexico, of certain engineering projects and the erection of fortifications during a military engagement, was regarded as a violation of his neutrality.²

The acceptance of a position as purchasing agent for the state of Louisiana, then in rebellion against the Union, was considered unneutral service on the part of a British subject.³ Similarly, the acceptance of a position in one of the Confederate states (Mississippi) by a British subject, which office could only be held by a citizen of the Confederacy, was held to be a violation of neutrality and a bar to the claim.⁴

The equitable claim, however, of an Italian, employed as an assistant engineer in the service of Venezuela, he having lived there but a few years, was allowed by Umpire Ralston, because "in a political sense he was not more important to the government than a day laborer." ⁵

The mere acceptance of a civil office under a foreign government will not in itself under ordinary circumstances be construed as a forfeiture of national protection. The Department will determine in each case how far such office-holding constitutes an identification with the interests of the foreign state so as to impair the citizen's right to protection. So, if coupled with an oath of allegiance to the foreign state such office-holding might well bar his right to claim the protection of the United States.⁶ It is regarded as an important factor, in connection with all the surrounding circumstances, in deciding whether the citizen has weakened his claim upon the protection of his own government. It is frequently applied in cases of naturalized citizens returning to their native country and accepting office there.⁷

¹ *Hevner (U. S.) v. Peru*, Dec. 4, 1868, Moore's Arb. 1650; same decision in cases of *Crosley*, *Hardy* and *Clark*, Moore's Arb. 1651.

² *Fitch (U. S.) v. Mexico*, July 4, 1868, Thornton, Umpire, Moore's Arb. 3476.

³ *Whitty (Gt. Brit.) v. United States*, May 8, 1871, Moore's Arb. 2823.

⁴ *Eakin (Gt. Brit.) v. United States*, May 8, 1871, Moore's Arb. 2819; *Hale's Rep.*, H. Ex. Doc., Pt. I, 43rd Cong., 1st sess. (For. Rel., 1873, pt. III), 15.

⁵ *Giordana (Italy) v. Venezuela*, Feb. 13, May 7, 1903, Ralston, 783, 797, 808.

⁶ *Mr. Hill, Asst. Sec'y of State, to Mr. Lombard*, May 12, 1900 (case in *Cuba*), Moore's Dig. III, 785.

⁷ See Moore's Dig. III, 782 *et seq.*, and various diplomatic notes there quoted.

Service in an urban guard to protect the community, under circumstances where the government was unable to protect foreigners against the depredations of Indians and others, was held by the United States as self-protection, and "not in support of any faction," hence not a violation of neutrality.¹ But the acceptance of office in the diplomatic service of a foreign government, combined with evidence of political interest in its factions during an extended period of time was held in the Corvaia case before the Italian-Venezuelan commission of 1903 to deprive the claimant of his standing as an Italian subject, although it must be added that the Italian civil code also provided that the acceptance of such office involved a loss of citizenship.²

§ 366. Participation in Politics.

Various cases have occurred in which the conduct of the citizen, while not necessarily unneutral, has nevertheless been construed as sufficiently unfriendly toward a third government or as a sufficient identification with its interests to debar his claim as a *bona fide* citizen of his own government entitled to full rights of diplomatic protection. Such cases have arisen particularly where the citizen has identified himself with the political disputes of a foreign government, or in some other way has so conducted himself toward that government that his own state in equity considers itself by his censurable conduct estopped from demanding full recognition of his rights as its citizen. Thus, where a certain United States citizen had invoked the interposition of the United States in respect of a claim against the Hawaiian government growing out of his alleged arbitrary arrest for connection with an attempted revolt in January, 1895, and it was shown that special rights of Hawaiian citizenship had been conferred on him under a constitution which conferred such rights on persons who had actively participated or otherwise rendered special service in the formation of the provisional government, the Department of State said:

"Having thus personally taken part in the subversion of one government and the establishment of another in a foreign country, it is questionable whether he has not so completely identified himself with the govern-

¹ Case in Peru, Moore's Dig. VI, 626-627.

² Corvaia (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 782.

ment which was finally established, as to have lost his right to American protection, notwithstanding he appears to have intended to reserve that right." ¹

Too great a degree of political activity in a foreign country often entails a forfeiture of national protection, and where it involves identification with armed factions forfeits neutral protection. There is, however, no reason to conclude that the exercise of minor political rights, such as voting, etc., without some other obnoxious intermixture in political affairs, would in itself be construed as a forfeiture of the right to diplomatic protection.

Participation of a claimant in violence or revolution against the defendant government so as to deprive him of his right of protection as a neutral citizen must be proved beyond all reasonable doubt in order that it may be pleaded as a defense against a claim for the value of neutral property destroyed by government troops.² Merely favoring a revolutionary party without any other acts of hostility will not deprive the citizen of a neutral nation from enforcing a claim for the use of his vessels not seized as hostile ships.³

Municipal courts of claims established by South American countries to adjudicate upon claims of foreigners arising out of rebellions usually provide that those foreigners who have committed a breach of neutrality by taking part in the revolution shall have no right to appear as claimants and require the claimant to prove that he is a foreigner and has not forfeited his neutrality.⁴ The requirement of proving neutrality under the law of Colombia gave rise to a ruling of the Department

¹ Mr. Uhl, Act'g Sec'y of State, to Mr. Willis, May 14, 1895, For. Rel., 1895, II, 854-5. See also the Hahnville lynching case, Moore's Dig. III, 344; cases in Moore's Dig. III, 784-786, and Bradford, Atty. Gen. (1795), 1 Op. Atty. Gen. 57. See particularly *Canevaro (Italy) v. Peru*, Nov. 25, 1899, Descamps and Renault, Rec. int. des traités du xx^e siècle, 1901, p. 711 (under protocol requiring claimant to prove neutrality).

² *Kelly (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 340-344.

³ *Orinoco Steamship Co. (U. S.) v. Venezuela*, Feb. 13, 1903, Ralston, 372; *Castro (U. S.) v. Mexico*, Convention of July 4, 1860, Moore's Arb. 2816-2817, in which an American citizen who had sided with the partisans of Maximilian in Mexico was compensated for the use of his store for quartering troops of Mexicans. This is not considered good law.

⁴ See law of Colombia on the recognition of claims of foreigners for exactions during the late rebellion. Bogata, Oct. 17, 1903, 98 St. Pap. 839, 841.

of State in answer to an inquiry as to whether the American legation could certify to the neutrality of American citizens. The Department held that such certification by a legation was irregular and unauthorized, and that citizens are bound by the neutrality laws of the United States to remain neutral. If they engage in acts violative of neutrality, they must bear the consequences, but the government will see that full justice and opportunity of defense are assured them. Their neutrality is presumed until the contrary is proved and application to the legation for a certificate of neutrality does not fortify the presumption which the legation is bound to entertain.¹

§ 367. Unfriendly Acts.

The unfriendly act against a foreign government is closely related, in its effects upon protection, to unneutral conduct. While commission of an unfriendly act frequently involves a violation of neutrality, it need not necessarily be unneutral, for it may occur in times of absolute peace. While unneutral conduct is usually a violation of the municipal law of the offender's state, the unfriendly act generally is an infringement of the local law of the state of residence. Both, however, give rise to repressive measures by the injured state and, in the absence of unusual cruelty or harshness, the national government of the guilty alien will not interfere to save him from the consequences of his act. Protection will sometimes go to the extent of an attempt to change or ameliorate the penalty to one of greater leniency.

The unfriendly act may take various forms. The element of hostility to the local government is always present. The act may consist in the publication of offensive articles tending to bring the government into contempt, or to induce attacks upon it. In numerous cases expulsion has been the penalty inflicted by the local government, and where the offender's national government was convinced of the justice of the charge, objection has rarely been raised against the execution of the penalty. Only where the expulsion has been carried out harshly or cruelly has the government interposed. It may be added, however, that the national government will usually demand

¹ Act'g Sec'y of State Hill, to Mr. Beaupré, July 22, 1902, For. Rel., 1902, pp. 314-315.

evidence of the guilt of its citizen. In many cases, it has not considered itself bound by the determinations of local courts or executive findings, but has instituted an independent investigation.¹ Similarly, improper methods in his trial may constitute a ground of objection and interposition, *e. g.*, where court-martial is substituted for regular judicial procedure.² As a general rule, in the presence of the unfriendly act of its citizen, the government will not extend its protection for the purpose of securing money damages, but will limit its interposition to assuring a proper measure of personal rights and comfort.

In Waller's case, in which claimant had been guilty of inciting certain natives of Madagascar, the Horas, against the French, and giving them information of a military nature, Secretary Olney reported:

"In view of Waller's willful and culpable attempt against the French authority in Madagascar, it is manifest that no claim for damages on Waller's account could be properly pressed by the United States, or could be expected to be entertained by the French Government."³

In the case of the *Caroline*, President Harrison, in his message of Dec. 7, 1841, said:

"If it shall appear that the owner of the *Caroline* was governed by a hostile intent, or had made common cause with those who were in the occupancy of Navy Island, then, so far as he is concerned, there can be no claim to indemnify for the destruction of his boat, which this government would feel itself bound to prosecute."⁴

Interposition, as observed, has generally been directed to securing an amelioration of a harsh penalty, or compensation for violation of a citizen's right to a fair trial and reasonable punishment.⁵

It has already been noted that an obnoxious intermixture in local politics may constitute a violation of neutrality. It may, in addition,

¹ Waller's case against France, For. Rel., 1895, I, 251 *et seq.*, Moore's Dig. II, 204 *et seq.*

² Cases cited and quoted in Moore's Dig. II, 198 *et seq.*

³ Mr. Olney, Sec'y of State, to the President, Feb. 5, 1896, For. Rel., 1895, I, 257.

⁴ 30 St. Pap. 194. See also Bradford, Atty. Gen. (1795), 1 Op. Atty. Gen. 57.

⁵ Carroll's case (Gt. Brit.) *v.* United States, where the penalty for seditious conduct was remitted to expulsion. See also Santangelo (U. S.) *v.* Mexico, April 11, 1839, Moore's Arb. 3333-34; Dubos (France) *v.* U. S., Jan. 15, 1880, Moore's Arb. 3319-32.

constitute an unfriendly act, and in either event has been held to forfeit national protection.¹

The famous Arbuthnot and Ambrister case, in which two Englishmen had incited the Indians to hostility against the United States, is an important case under this head. These men were found guilty by a military court, respectively, of "aiding and comforting the enemy and supplying them with the means of war" and of "levying war against the United States." Both were shot. It is unnecessary to discuss Jackson's unscientific language in defense of their execution, to the effect that they forfeited their allegiance and became outlaws and pirates. At all events, Great Britain, while not acquiescent in the harsh sentence and execution, decided that it could not interfere for the protection of British subjects who engage, without the consent of their government, in a foreign war. They become liable to military punishment if the party by whom they are taken chooses to carry the rights of war to that cruel severity. Lord Castlereagh observed that the grounds on which they had forfeited the rights of British protection were that they had

"identified themselves, in part at least, with the Indians, by going amongst them with other purposes than those of innocent trade; by sharing in their sympathies too actively when they were upon the eve of hostilities with the United States; by feeding their complaints; by imparting to them counsel; by heightening their resentments, and thus at all events increasing the predispositions which they found existing to the war, if they did not originally provoke it."²

Had a weaker government than the United States been charged with such conduct toward British subjects, it is not improbable that Great Britain would have come to a different conclusion, just as the United States did in the cases of Cannon and Groce, who were executed in

¹ Tripler (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 2823-24. See convention between the United States and Ecuador for the submission of claims of Julio R. Santos, Feb. 28, 1893, 86 St. Pap. 1175-76. Baty, *International law*, p. 170-171. Unneutral behavior subsequent to an unjust expulsion will not bar a claim for damages arising out of the expulsion. Murphy (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 3343.

² Mr. Rush, Minister at London, to Mr. Adams, Sec'y of State, Jan. 25, 1819, Moore's Dig. VI, 621. For a full statement of this case see Halleck, *International law*, London, 1908, II, 200-202, and 6 St. Pap. 423 *et seq.*

Nicaragua under circumstances not altogether dissimilar to those in the cases of Arbuthnot and Ambrister. Perhaps the barbarous nature of the warfare conducted by the latter would be construed by the Department of State as an inherent difference. At all events, it would seem that the United States had to assume inconsistent positions in the two cases. Jackson's language is of course utterly indefensible. If it is true that Cannon and Groce held regular commissions in Estrada's army, the Department of State occupied perhaps a more defensible position against Nicaragua than they did in the earlier case as against Great Britain.

§ 368. Unneutral Supplies and Other Aid.

Aid has frequently been furnished to foreign belligerent governments or revolutionary parties abroad. Such aid when furnished by a neutral citizen is considered as in violation of neutrality and operates to forfeit neutral protection. Thus, Secretary of State Seward stated that good offices will be refused

"when the debt . . . was incurred to aid the debtor government to make war on a country with which the United States was at peace."¹

Two important cases in municipal courts have had an important effect in laying precedents for international tribunals on the question of the illegality of a contract to render aid to insurrectionary governments and the impossibility of recovery by a person so aiding. Thus, in the celebrated case of *Kennett v. Chambers*, in which American citizens contracted with a citizen of Texas to lend money in the war of Texas against Mexico, in return for an agreement to convey certain lands in Texas, Chief Justice Taney held that not only had the American citizen by advancing such money violated the neutrality laws of the United States, but the contract itself was illegal and void from the beginning and, therefore, unenforceable in a court of the United States.²

Likewise, in the noted case of *De Wutz v. Hendricks*,² the English

¹ Mr. Seward, Sec'y of State, to Messrs. Leavitt & Co., May 6, 1868, Moore's Dig. VI, 710.

² *Kennett v. Chambers* (1852), 14 Howard, 38, Scott's Cases, 723; *De Wutz v. Hendricks*, 9 Moore C. P. 586, Scott's Cases, p. 721. See also *Gill v. Oliver*, 11 How-

Court of Common Pleas decided that it was contrary to the law of nations for persons residing in England to enter into engagements to raise money by way of loan for the purpose of supporting subjects of a foreign state in arms against a government in friendship with England and that no right of action attached to any such contract.

In the case of *Hargous v. Mexico*,¹ in which claimant supplied Mexico, under contract, with two war vessels, the commission held that while Mexico could not have made the defense of the illegality of the contract, it could be maintained by the United States on the very strongest ground in that the vessels were intended for service against the United States government.

Numerous cases came before the United States-Mexican Commission of 1868 in which United States citizens had aided Mexico in her struggles for independence against Spain by contracting with Mexican agents in the United States to send emigrants to Mexico and assist in the raising of military supplies to aid its armies. The claims were usually dismissed on the ground that by such aid to Mexico the United States citizen had forfeited his right to the protection of his government.²

Numerous cases have come before other commissions in which the claim was dismissed and claimant's national protection declared forfeited on the ground that he had contributed aid either by way of money or arms to a revolutionary party.³

ard, 529, citing *Williams v. Oliver*, Maryland Court of Appeals, June, 1843. See also Kent's Commentaries, I, 116; *Jarvis (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 149; *Cucullu (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3477 *et seq.*

¹ *Hargous (U. S.) v. Mexico*, Act of March 3, 1849, Moore's Arb. 1280-1283.

² *Sturm (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2756-2757; *Brannin (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2757; *Greene (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2756.

³ *Rivas y Lamar (U. S.) v. Spain*, Feb. 12, 1871, Moore's Arb. 2781; *Springbok (Gt. Brit.) v. U. S.*, May 8, 1871, *ibid.* 3921, Hale, 117; *Raborg (U. S.) v. Peru*, Jan. 12, 1863, Moore's Arb. 1613-1614; *Gros (U. S.) v. Mexico*, July 4, 1868, *ibid.* 2771 (*dictum*, claimant not being a citizen of the United States); *Patterson (U. S.) v. Mexico*, Act of Congress, Mar. 3, 1849, Moore's Arb. 2780 (supplying of coal; *dictum*, claimant did not prove ownership of the vessel); *Vernon (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3304, Hale, 81; *Isabel (Gt. Brit.) v. U. S.*, May 8, 1871, Hale, 114.

But where such aid, in the shape of merchandise sold, was given to revolutionists, the owners of the goods being ignorant of their intended destination to revolutionists,

International commissions have occasionally made an exception to the rule where an award was sought against the belligerent with whom the contract was made. The demands of equity or some special acknowledgment of the debt by the defendant government was usually regarded as a just reason for an award, and the presumption was always entertained that by presenting the claim the claimant government had waived the violation of its own law. Such exceptions were made in a number of claims against Mexico arising out of contracts made in the United States with General Mina, the agent of the Mexican government, for aid to Mexico in her war with Spain. While under the general rule these claims would have been disallowed, Mexico had by an act of 1825 acknowledged its liability on these claims. The domestic commission under the act of 1849 held that

"this new obligation was not obnoxious to the objection which vitiated the claim arising out of the original claim and has since been recognized as valid and binding upon that government."¹

In the case of Lake,² an American citizen had made great sacrifices in the service of Mexico, and on equitable grounds the Mexican commissioner, Palacio, considered that Mexico ought not to reject the claim.

The unneutral conduct of one partner seems to be attributable generally to the other partner in all transactions arising out of the partnership relation or in which the partnership has an interest.³

Various forms of unneutral service in time of war, *e. g.*, the carriage of enemy dispatches or correspondence, the carriage of enemy persons, repetition of signals, etc., render the neutral liable to capture by the

Duffield (Umpire) believed (*dictum*) that it did not cause a loss of national protection. *Kummerow (Germany) v. Venezuela*, Feb. 13, May 7, 1903, *Ralston*, 526.

¹ *Meyer (U. S.) v. Mexico*, Domestic Commission, March 3, 1849, *Moore's Arb.* 2390, footnote citing cases of *Porter and McRae*. Cases before Commission under convention of April 11, 1839, *Moore's Arb.* 1243; *Parrott (U. S.) v. Mexico*, Mar. 3, 1849, *Moore's Arb.* 2439; *Meade (U. S.) v. Mexico*, *Moore's Arb.* 3430; *Gill v. Oliver's Executors*, 11 How. 533; *Kummerow (Germany) v. Venezuela*, Feb. 13, May 7, 1903, *Ralston*, 526 (*dictum*; aid to successful revolutionists).

² *Lake (U. S.) v. Mexico*, July 4, 1868, *Moore's Arb.* 2754.

³ *McStea (U. S.) v. Great Britain*, Act of June 5, 1882, No. 1015, Class 1, *Moore's Arb.* 2380. But a corporation was not affected merely by the disloyalty of its officers. *Officers, etc., v. U. S.*, 20 Ct. Cl. 18.

wronged belligerent, under the universally recognized laws of war, and necessarily entail a forfeiture of national protection.¹ The carriage of contraband goods and attempts at blockade running are transactions which, while entailing liability to capture, are not considered as unneutral service.

(d) *Aid and Comfort*

§ 369. Definition of "Aid and Comfort."

It has just been observed that various forms of transactions, by the fact that they render aid to one as against another belligerent, constitute unneutral acts.

The protocols of mixed and domestic commissions occasionally provide specifically that the commission shall have jurisdiction over claims of such citizens as had not voluntarily given aid and comfort to the enemy. Thus, the protocol of January 15, 1880 between France and the United States, the protocol of the United States-Chilean commission of August 7, 1892, the Abandoned or Captured Property Act of March 12, 1863 and the Act of March 3, 1871 establishing the Southern Claims Commission, excluded from the benefits of their provisions those individuals who had given voluntary aid and comfort to the enemy. The principle was expressed as follows in *Carlisle v. United States*, in the case of aliens domiciled in the Confederate states:

"Those aliens who, being domiciled in the country prior to the rebellion gave aid and comfort to the rebellion were . . . subject to be prosecuted for violation of the laws of the United States against treason and for giving aid and comfort to the rebellion."²

The principle naturally applied to aliens who after the outbreak of the war gave aid and comfort to the belligerents. The Abandoned or Captured Property Act made it a matter of preliminary proof for the alien to show that he had given no aid and comfort to the rebellion and for the citizen to show loyalty.³

One of the most important international cases involving the construction of the aid and comfort clause was that of *Grace Brothers* before

¹ On unneutral service see Oppenheim, II, ch. V, pp. 515-532.

² *Carlisle v. The United States*, 16 Wall. 148.

³ *Carroll v. The United States*, 13 Wall. 151; *Hill v. The United States*, 8 Ct. Cl. 470.

the United States-Chilean commission of 1892. Claimants had furnished various supplies to the Peruvian government in its war with Chile, including coal for a ship, supplies for the navy, electrical batteries for the army, had guaranteed a certain person the payment of his services for the remodeling of old rifles belonging to Peru, and advanced to a Peruvian agent in the United States money to purchase arms. As a defense to the jurisdictional objection that they had voluntarily given aid and comfort to the enemies of Chile, the claimants alleged that the supplies were furnished by virtue of a contract with Peru made prior to the war, that the supplies furnished were not contraband, that as neutral citizens they had the right to carry on business with Peru, and that even if the supplies were contraband, the only penalty was the liability to seizure while *in transitu*. Commissioners Claparède and Gana¹ (Goode, dissenting) held that by furnishing articles which by their nature might serve directly and indirectly in the war, they had voluntarily given aid and comfort such as the protocol provided for. Nor does it seem to be necessary that the claimant who furnished supplies to such enemy shall have been guilty of a hostile intention, for

"willingness to give aid and comfort to the enemy without assuming a hostile character towards the other party can be considered as established in all cases in which he who commits those acts in his sound senses can and must know that such acts involve an increase of the strength of one of the belligerents to the detriment of the other."

To the defense of previous contract, the commissioners answered:

"The state of war is a case of superior force which suspends, modifies, or alters all contracts. . . ."

¹ The furnishing of electric wire and batteries for the use of the reserve corps of the army; guaranteeing a certain mechanic in the employ of Peru the payment of his services in remodeling rifles; advancing to a Peruvian consul general in the United States the funds necessary to attach certain Chilean cargoes of nitrate; the payment of the bills of a special agent of Peru engaged in the purchase of arms in the United States—were all considered acts of voluntary aid and comfort. But where the property was surrendered by the claimants on the demand of the Peruvian government, where the property (certain launches) would have been taken without the owner's consent, it cannot be considered voluntary aid and comfort (*dictum*). Doctrine of Claparède and Gana in the case of the Grace Brothers (U. S.) v. Chile, August 7, 1892, Moore's Arb. 2781 *et seq.*

and places the parties in the free and unrestricted position they held before the contract was made.

The payment of customs duties to the confederate government on certain brandy removed from the custom house under the Confederate régime was held by the French-United States Commission of 1880 not to be an "aid and comfort" to the enemies of the United States.¹

Under the Abandoned or Captured Property Act an alien suing to recover the proceeds of captured property did not have to show loyalty, but it was necessary to show that he had not voluntarily given aid or comfort to the rebellion.²

The Supreme Court construed the meaning of the words "aid and comfort" as follows:

"The words 'aid and comfort' are used in this statute in the same sense they are in the clause of the Constitution defining treason (art. 3, sec. 3), that is to say, in their hostile sense. The acts of aid and comfort which will defeat a suit must be of the same general character with those necessary to convict of treason, where the offense consists in giving aid and comfort to the enemies of the United States. But there may be aid and comfort without treason, for treason is a breach of allegiance, and can be committed by him only who owes allegiance." . . . "A claimant to be excluded [under the Abandoned or Captured Property Act] need not have been a traitor; it is sufficient if he has done that which would have made him a traitor if he had owed allegiance to the United States."³

Among others, the following acts have been considered as voluntary aid and comfort to the enemy:

"Standing guard over federal prisoners and aiding in the local defence of Richmond; ⁴ commercial transactions within the confederate lines by the citizen of a loyal state; ⁵ fitting out a vessel in a confederate

¹ *De Forge et Fils (France) v. The United States*, January 15, 1880, Moore's Arb. 2781; Boutwell's Rep. 132. See also Mr. Hay, Sec'y of State to Mr. Merry, April 17, 1899, For. Rel., 1899, p. 566.

² *Byrnes v. The United States*, 3 Ct. Cl. 238; *McElhose v. The United States*, 3 Ct. Cl. 240; *Bruning v. The United States*, 3 Ct. Cl. 242; *Hill v. The United States*, 8 Ct. Cl. 470; *Carlisle v. The United States*, 6 Ct. Cl. 398; 16 Wall. 147.

³ *Young v. The United States*, 97 U. S. 39, 63.

⁴ *Keeper v. The United States*, 3 Ct. Cl. 74.

⁵ *Geering and Richardson v. The United States*, 3 Ct. Cl. 165.

port and running a blockade;¹ dealing in goods, by a citizen of a loyal state, which he knows to have run the blockade, and subscribing to a confederate loan;² becoming surety on the bonds of Confederate officers;³ being voluntarily connected with and having stocks in companies organized to run a blockade;⁴ moving further south on the approach of the Union forces to prevent the emancipation of the owner's slaves;⁵ manufacturing and selling salt-petre to the Confederates;⁶ trading by a non-resident alien with the Confederacy and giving them cannons and munitions of war;⁷ purchasing permission from the Confederates to export cotton;⁸ purchasing cotton from the Confederates, knowing the money was to be used to sustain the rebellion.⁹ The drawing of Confederate bonds was held to be relieving the enemy with money and a bar to a claim before the United States-British Commission of 1871.¹⁰ The aid must, of course, be voluntary.¹¹

The general amnesty proclamation did not extend to non-resident aliens who had given aid and comfort to the rebellion. Such conduct on the part of an alien was not an offense against the United States, and the proclamation extended only to offenders against the laws

¹ *Geering and Richardson v. The United States*, 3 Ct. Cl. 165.

² *Stark v. The United States*, 4 Ct. Cl. 280; *Dubois (France) v. U. S.*, Jan. 15, 1880, Moore's Arb. 3742, Boutwell's Rep. 128 (claimant knew his purchase of bonds would aid Confederacy). But in *Rochereau*, *ibid.* 3739, Boutwell's Rep. 124, non-resident French partner had no knowledge of the purchase of the bond, and his share of the claim was allowed.

³ *U. S. v. Padelford*, 9 Wall. 531; 4 Ct. Cl. 316.

⁴ *Bates v. The United States*, 4 Ct. Cl. 569.

⁵ *Armstrong v. The United States*, 13 Wall. 154; 5 Ct. Cl. 623.

⁶ *Carlisle and Henderson v. The United States*, 16 Wall. 147; 6 Ct. Cl. 398.

⁷ *Young v. The United States*, 97 U. S. 39; 12 Ct. Cl. 648.

⁸ *Radich v. Hutchins*, 95 U. S. 210; see also Moore's Dig. VI, 625. But paying for permission to remove lumber was held, by an equally divided court, "aid and comfort" in the case of *Bauriedel*, No. 239, before the Spanish Treaty Claims Commission, Explanatory Notes, Briefs, XXIV, 126.

⁹ *Sprott v. U. S.*, 20 Wall. 459. In *Laurent (Gt. Brit.) v. U. S.*, Feb. 8, 1853, Moore's Arb. 2671, the better ground for the disallowance of the claim would have been that by purchasing church property from the Mexican government, they had rendered aid and comfort to the enemy, and thus engaged in an unneutral transaction. See *Lapradelle & Politis' Recueil*, I, p. 675.

¹⁰ *Nicolson (Gt. Brit.) v. The United States*, May 8, 1871, Moore's Arb. 3298, Hale, 77.

¹¹ *U. S. v. Padelford*, 9 Wall. 531.

of the United States.¹ Nor did a pardon to a citizen, disloyal during the war, restore his right to maintain a claim against the government.²

The Southern Claims Commission required claimants to prove that they had remained "loyal adherents to the cause and the government of the United States during the war," whereas the Act establishing the Court of *Alabama* Claims required an allegation that they had borne "true allegiance to the United States." By the former commission, neutrality, even when established, was not held to constitute "loyal adherence" to the United States, whereas the *Alabama* court accepted the negative declaration that claimants had not in any manner aided or assisted the rebellion. The Southern Claims Commission considered the following to be disloyal acts: voting for session or secession candidates; residing or removing within the Confederate lines as a matter of choice; holding office under the Confederacy; service in the Confederate army or navy, personally or by substitute; furnishing supplies to the Confederacy; arming or equipping persons entering the Confederate service; engaging in business intended or calculated to aid the Confederate cause; subscribing to Confederate loans, or selling cotton or other produce to the Confederate government in aid of its finances; or doing any other thing of a nature to aid the Confederate and injure the Union cause.³

§ 370. Acts which do not Constitute "Aid and Comfort."

The following have been held not to be acts of voluntary aid and comfort:

Joining a company formed in a disloyal state to carry out cotton through the blockade, with the permission of the United States;⁴ voluntary patrol duty in a home guard, in the nature of police duty, on the part of one otherwise showed to be loyal;⁵ acts not intended as aid and comfort to the enemy and committed under fear and appre-

¹ *Young and Collie v. The United States*, 97 U. S. 39.

² *Hart v. The United States*, 15 Ct. Cl. 414.

³ 7th Gen. Rep. of the Commissioners of Claims, Act of March 3, 1871, H. Misc. Doc. 4, 45th Cong., 2nd sess., 5-6; *Rodocanochi Sons & Co. v. U. S.*, Act of June 23, 1874, *Moore's Arb.* 2359.

⁴ *Lynch v. The United States*, 3 Ct. Cl. 392.

⁵ *Miller and Fellow v. The United States*, 4 Ct. Cl. 288.

hension of danger to the person and property of claimant;¹ removing the family of a loyal citizen surrounded by contending armies to a place of safety, though within the Confederate lines;² compulsory detention of the person and property of a loyal citizen in an insurrectionary state, his subsequent sale of property (horses) and the investment of the proceeds in cotton;³ entering a Confederate arsenal as a workman without pay to avoid conscription, in fact, payment for the appointment, where the loyalty otherwise was established;⁴ yielding passive obedience to the *de facto* Confederate government in civil and local matters;⁵ purchase by a non-resident alien of cotton in the disloyal states for ordinary business purposes through a commercial house within the enemy's lines and the acceptance and payment of drafts for the purchase price of the cotton;⁶ writing an unsent letter to the head of the Confederate government offering the service of the writer, an alien resident;⁷ bribing a Confederate officer by giving him cotton to prevent the confiscation or destruction of the balance;⁸ joining in a proposed blockade running enterprise which was not to be operated until the United States gave their sanction, such sanction not having been given;⁹ purchase of cotton by a non-resident alien through an agent in the enemy's territory, though he was engaged in blockade running;¹⁰ subscribing money to a blockade running enterprise where it does not appear that the blockade was run or attempted to be run.¹¹

¹ Ayres *v.* The United States, 4 Ct. Cl. 422.

² Hayden *v.* The United States, 4 Ct. Cl. 475.

³ Foster *v.* The United States, 5 Ct. Cl. 412. See also Spain *v.* The United States, 5 Ct. Cl. 598, these transactions not being in violation of the non-intercourse laws.

⁴ Koester *v.* The United States, 5 Ct. Cl. 642.

⁵ Price *v.* The United States, 5 Ct. Cl. 706.

⁶ Harrison *v.* The United States, 6 Ct. Cl. 323.

⁷ Medway *v.* The United States, 6 Ct. Cl. 421.

⁸ Coogan *v.* The United States, 7 Ct. Cl. 510. This transaction though invalid under the laws of the Confederacy was not thereby invalid under the laws of the United States.

⁹ Austell *v.* The United States, 7 Ct. Cl. 599.

¹⁰ Collie *v.* The United States, 9 Ct. Cl. 431; 94 U. S. 258. Blockade running in munitions of war intended for the Confederates would, however, be voluntary aid and comfort. Young *v.* U. S. (1877), 97 U. S. 39.

¹¹ Hill *v.* The United States, 8 Ct. Cl. 470.

CHAPTER IV

FORFEITURE OF PROTECTION BY ACT OF CITIZEN—Continued. RENUNCIATION OF PROTECTION

EXPRESS RENUNCIATION BY CONTRACT

§ 371. The So-called Calvo Clause.

Naturalization abroad is perhaps the most binding form of contractual renunciation of citizenship and protection. ~~A~~ more subtle form of renouncing protection consists in the incorporation in contracts between the local government and a foreigner of a stipulation by which the foreigner agrees to bring his disputes and differences arising out of the contract before the local courts exclusively, with the further express or implied agreement that he renounces his right to call upon his own government for protection in all matters arising out of the contract. This form of contractual renunciation of diplomatic protection arises out of a doctrine advanced by the celebrated South American publicist, Calvo, and in its broadest sense it posits the principle that no nation ought to intervene, diplomatically or otherwise, against another, to enforce its citizen's private claims of a pecuniary nature—a principle which has been resorted to frequently by the South American countries as a preventive measure of defense against the insistent demands of foreign countries for the payment of private claims due their citizens. In Calvo's work on international law, these principles are expressed as follows:

"America as well as Europe is inhabited today by free and independent nations, whose sovereign existence has the right to the same respect, and whose internal public law does not admit of intervention of any sort on the part of foreign peoples, whoever they may be." (5th ed., I, § 204, p. 350.)

He condemns armed and diplomatic intervention with equal severity (I, § 110, p. 267),

"Aside from political motives these interventions have nearly always had as apparent pretexts, injuries to private interests, claims and demands for pecuniary indemnities in behalf of subjects. . . . According to strict international law, the recovery of debts and the pursuit of private claims does not justify *de plano* the armed intervention of governments, and, since European states invariably follow this rule in their reciprocal relations, there is no reason why they should not also impose it upon themselves in their relations with nations of the new world." (I, § 205, pp. 350-351.)

"It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country prosecuting the delinquents, and not claim from the state to which the authors of the violence belong any pecuniary indemnity." (VI, § 256, p. 231.)

"The rule that in more than one case it has been attempted to impose on American states is that foreigners merit more regard and privileges more marked and extended than those accorded even to the nationals of the country where they reside." (III, § 1278, p. 140.)

While the last two propositions were made with specific reference to redress for injuries arising out of civil war and acts of violence, the inference drawn from the whole text, read together with the general principle that foreigners are subject to the local law and must submit their disputes to local courts, has given the Spanish-American countries a basis to assert the doctrine that in his private litigation the alien must exhaust his local remedies before invoking diplomatic interposition and that in his claims against the state he must make the local courts his final forum. These states do generally, though not always, admit the rule that where there is a denial of justice, recourse to diplomatic interposition is permissible. They have written these principles into their constitutions, statutes and treaties, and in this form they will receive more critical attention in Chapter VII, in which we shall deal with the attempts by municipal legislation and by treaty to limit diplomatic interposition.

The whole doctrine of the final jurisdiction of the local courts over the claims of aliens, with a denial of the right to diplomatic recourse, has received the name of the Calvo doctrine.¹ The so-called Drago

¹ Calvo, *Le droit international*, §§ 204-5. On the Calvo Doctrine, see Amos S. Hershey, in 1 A. J. I. L. (1907), pp. 26-45; Percy Bordwell in 18 Green Bag (1906),

Doctrine and the Porter proposition adopted at the Hague Conference of 1907 have been examined under the general subject of contract claims.¹

§ 372. Its Incorporation in Concession-Contracts in Latin-America.

Of the three principal classes of claims in which Latin-American States have sought to limit the diplomatic protection of foreigners, namely: first, claims arising out of injuries received in civil wars; secondly, claims based upon acts of violence and oppression, such as false arrest, imprisonment, and expulsion; and, thirdly, claims arising out of concession-contracts concluded with aliens, the subject of our present inquiry—the contractual renunciation of diplomatic protection—arises generally in connection with concession-contracts granted by governments to foreigners, although there have occasionally been cases of personal injury or other forms of contract in which there has been an express waiver of the alien's right to national protection.

The European states having for the most part been unwilling to conclude treaties stipulating for the complete surrender of private claims of their citizens to the local courts, the Latin-American states, on the authority of Calvo and the general international law applied in Europe, have sought other means to attain their end and secure freedom from the constant employment of diplomatic measures of coercion to which they find themselves subject.²

This they have done by establishing certain limitations upon protection in their constitutions, laws, treaties and contracts with foreigners. They assert the right to do this on the legal grounds of independence, sovereignty, complete territorial jurisdiction and the principle, generally recognized, that individuals who establish them-

377-382; Edgington, T. B., *The Monroe doctrine*, Boston, 1904, pp. 218-260; Crichfield, G. W., *American supremacy*, New York, 1908, Vol. II, 39 *et seq.*

¹ *Supra*, §§ 119 *et seq.*

² Pradier-Fodéré, I, §§ 204-5; Calvo, I, §§ 204-5; Despagnet, *Cours de droit international public*, 2d ed., 1899, p. 197; 2 R. G. D. I. P. (1895), 341.

As early as 1852 the Venezuelan Government had endeavored to obtain an agreement among the Latin-American states not to recognize any of the claims presented by foreign governments in matters of private interest. Mr. Leocardio Guzman was charged at Lima and other capitals with a mission whose object was, it was said, to prepare an *entente* of the American states on this point. *Annuaire des deux mondes*, Vol. 3, 1852-3, p. 749, cited in 4 R. G. D. I. P. (1897), 227-228.

selves in a foreign state must submit to the local law. In this contention they are supported by some well-known publicists, particularly Calvo,¹ Pradier-Fodéré,² Bluntschli,³ Seijas,⁴ and Fiore.⁵

Since 1886 many of these states have incorporated into their constitutions and laws a provision that every contract concluded between the government and an alien shall bear the clause that the foreigner "renounces all right to prefer a diplomatic claim in regard to rights and obligations derived from the contract," or else that "all doubts and disputes" arising under it "shall be submitted to the local courts without right to claim [the] diplomatic interposition of the alien's government."⁶

¹ Calvo, I, §§ 204-5, pp. 350-351, § 1278 *et seq.*, III, 140 *et seq.*; VI, § 256, p. 231.

² Pradier-Fodéré, §§ 204-205; §§ 402-403, § 1363 *et seq.* "But in regard to the duty of protecting its nationals, we must posit certain rules. We must remember that when individuals establish themselves in a foreign country, they submit tacitly to its laws, and must make use of the means of redress open to the inhabitants, without being placed in a better position than natives of the country. . . . When the local courts have decided a case, the alien and his government cannot complain, if the alien has not been the victim of violations of international law, of arbitrary procedure or denial of justice on the part of the local authorities, of odious discriminations, of penalties harsher than those inflicted on nationals . . . and finally, if there has been no violation of the provisions of public treaties in force between the two governments. (§ 403.)

³ Bluntschli, *Le droit international codifié*, 5th ed., by C. Lardy, Paris, 1895, §§ 380, 386, 388.

⁴ Seijas, *El derecho internacional*, III, p. 308 *et seq.*; IV, pp. 507-514 and opinions there cited.

⁵ Fiore, P., *Nouveau droit international public*, Paris, 1885, Antoinet's translation, §§ 648-657.

Fiore believes that protection is unjustifiable when its object is to obtain for subjects abroad a privileged position. He holds that if, for reasons of State, the constituted authorities of a country enact measures applying to the whole population, but which may seem harsh to foreigners, foreign governments have no right to endeavor to relieve their subjects in such cases from burdens which all the inhabitants must bear (§ 648). He justifies protection of the interests of an individual only where the foreign government acts arbitrarily towards the alien in violating a principle of law, *i. e.*, only when it deprives aliens of the enjoyment of civil rights, etc. (§ 649).

Antoine, Fiore's translator, believes that when a state treats aliens in a prejudicial manner by laws which are in derogation of the usage of civilized countries of our time, intervention is legitimate. He thus justifies the intervention of France in 1838 in Buenos Ayres and Mexico.

⁶ Ecuador, constitution, Art. 38, Rodriguez, *American Constitutions*, II, 283,

The general policy of the United States and of one or two other countries¹ in the matter of contract claims has already been discussed, and it has been observed that in *ordinary* cases arising out of contract these countries have declined their diplomatic interposition,—except in case of denial of justice—so that the clause renouncing diplomatic protection in these cases may be regarded as merely confirmatory of the general attitude assumed by these states.² As a rule, the policy of the United States has been not to interfere with the right of a foreign government to prescribe the terms of concessions which it may grant to American citizens to carry on business within its territory, and after a concession in which a certain privilege is denied has been accepted, the United States will not demand the annulment of the provision.³ Unless the foreign state has perpetrated upon its citizen some gross violation of the rights of the concessionary, usually embraced in the category of a denial of justice, or confiscatory breach of the contract, the United States has declined its official interposition to Americans contracting with foreign governments or individuals, although good offices are generally extended.⁴

4 R. G. D. I. P. (1897), 228. See also Ecuador, law of August 25, 1892, Art. 14, 84 St. Pap. 646; Venezuela, constitution, Art. 124, Rodriguez, I, 230-1; Colombia, law of November 26, 1888, Art. 15, 79 St. Pap. 167 *et seq.*

See letter of Secretary of State Bayard, to Mr. Straus, Minister to Turkey, June 28, 1888, For. Rel., 1888, pt. 2, p. 1599, Moore's Dig. VI, 296-7, with reference to a law of Turkey of January 10, 1888, Art. 5, providing that foreigners shall not be permitted to set up printing offices in Turkey unless by formal declaration they renounce the privileges and immunities of foreigners.

¹ Italy, for example. For the policy of Italy see 4 R. G. D. I. P. (1897), 405-406, citing notes of Italian Minister of Foreign Affairs. Nevertheless, it may be doubted whether Italy considers this a general policy.

² Although the United States has usually not declined to exercise good offices. See Moore's Dig. VI, 705 *et seq.*

³ Mr. Hay to Mr. Powell, Minister to Haiti, April 1, 1899, Moore's Dig. VI, 289.

⁴ Mr. F. W. Seward, Act'g Sec'y of State, to Mr. Logan, April 15, 1879, Moore's Dig. VI, 293; Statement of Mr. Hay, Sec'y of State, in the case of Salvador Commercial Company (U. S.) v. Salvador, Moore's Dig. VI, 731-732, For. Rel., 1902, pp. 839, 871; Mr. Olney, Sec'y of State, in claim of North and South American Construction Company v. Chile, Moore's Dig. VI, pp. 728-729, For. Rel., 1895, pt. 1, p. 83; Calvo, *op. cit.*, VI, § 366, p. 351; McMurdo's case (U. S.) v. Portugal, Moore's Arb. 1865-1899, Moore's Dig. VI, 727-728, 297.

§ 373. Its Ineffectiveness in Preventing Interposition. Practice of the United States.

In some cases, however, interposition has been made dependent upon the absence of any renunciation on the part of the citizen of the privilege of appealing to his own government, and Secretary of State Fish in one case believed himself barred from interfering where such a stipulation had been entered into by the citizen.¹ This attitude, however, is a distinct exception to the general practice of the Department of State. The position now uniformly assumed is perhaps best expressed in an instruction of Secretary of State Bayard in 1888:

"This government cannot admit that its citizens can, merely by making contracts with foreign powers, or by other methods not amounting to an act of expatriation or a deliberate abandonment of American citizenship, destroy their dependence upon it or its obligations to protect them in case of a denial of justice."²

Mr. Gresham, Secretary of State, interpreted the clause of the Venezuelan constitution to the effect that

"in every contract of public interest there shall be inserted the clause 'that doubts and controversies which may arise regarding its meaning and execution shall be decided by the Venezuelan tribunals and according to the laws of the Republic, and in no case can such contracts be a cause for international claims'"

to mean that the party claiming under the contract

"agrees to invoke for the protection of his rights only the authorities, judicial or otherwise, of the country where the contract is made. Until he has done this, and, unless having done this, justice is plainly denied him, he cannot invoke the diplomatic intervention of his own country for redress. But if his application to the authorities of the country where the contract is made results in the palpable denial of justice, or in a plainly unjust discrimination against the applicant as an American citizen, the clause above quoted would hardly be construed to prevent an appeal for diplomatic intervention if such intervention would otherwise be allowable under the rules of international law."³

¹ Mr. Fish, Sec'y of State, to Mr. Butler, Oct. 5, 1871, Moore's Dig. VI, 293.

² Mr. Bayard, Sec'y of State, to Mr. Buck, Minister to Peru, Feb. 15, 1888, Moore's Dig. VI, 294; Mr. Bayard to Mr. Scott, Minister to Venezuela, June 23, 1887, Moore's Dig. VI, 294; Mr. Bayard to Mr. Hall, Minister to Central America, March 27, 1888, For. Rel., 1888, I, 137; Mr. Adee, Act'g Sec'y of State, to Mr. Partridge, Minister to Venezuela, July 26, 1893, For. Rel., 1893, pp. 734, 735.

³ Mr. Gresham, Sec'y of State, to Mr. Crawford, Sept. 4, 1893, Moore's Dig. VI, 299-300.

By the last clause Mr. Gresham probably meant that the exhaustion of local remedies and a denial of justice are conditions precedent to diplomatic intervention. With this reservation, therefore, that the citizen must not suffer a denial of justice, the Department of State has upheld the right of the citizen to stipulate for local courts as an appropriate forum for his disputes.

Where the contract stipulation has attempted to go further and completely oust the right of the government to intervene under all circumstances and to foreclose the citizen's right of appeal even in a case of denial of justice, the Department of State has denied the validity of such contractual renunciation. As Mr. Bayard stated:

"It is not competent to a citizen to divest himself of any part of his inherent right to protection or to impair the duty of his government to protect him;"¹

and furthermore that

"no agreement by a citizen to surrender the right to call on his Government for protection is valid either in international or municipal law."²

§ 374. Executive Views as to the Renunciation of Protection or Indemnity.

The subtle measure adopted by Mexico in its railroad grants, by the terms of which officers and employees of its roads are declared amenable to the laws as Mexicans and are inhibited from pleading rights of alien protection met with a similar objection by Mr. Bayard. Such service in Mexico was deemed a contract, a condition of which was the surrender by the employees of their right to invoke diplomatic protection. While considering that alien employees became thereby "entitled to *justice* in Mexico in lieu of the broader claims to international justice," nevertheless, "in case of a denial of justice, the obligation of this government to protect [its citizens] remains unimpaired."³

¹ Mr. Bayard, Sec'y of State, to Mr. Straus, Minister to Turkey, June 28, 1888, For. Rel., 1888, v. 2, p. 1519. See also Mr. Wilson, Act'g Sec'y of State, to Mr. Hibben, Chargé, May 19, 1909, For. Rel., 1909, p. 222.

² Mr. Bayard, Sec'y of State, to Mr. Hill, Feb. 16, 1887, For. Rel., 1887, p. 100.

³ Mr. Bayard, Sec'y of State, to Mr. Morgan, Minister to Mexico, May 26, 1885, Moore's Dig. VI, 294.

Where there have been confiscatory breaches of contract, it has been noted that the government has not considered itself hampered by its general policy of non-intervention in contract claims and both the Department and international commissions have in such cases relieved claimants from the obligation of their stipulation inhibiting them from invoking the diplomatic protection of their own government.

It has already been observed ¹ that the government may prosecute a claim arising out of an injury to a citizen, notwithstanding the fact that the citizen renounces his right to an indemnity, the principle being explainable on the theory that the injury to the citizen gives rise to two independent causes of action, one of the state, the other of the citizen. Nevertheless, unless the offense is particularly flagrant or may be deemed a national affront, the individual's waiver of a right to indemnity weakens the moral, if not the legal, right of his government to demand reparation, and the government may well consider itself justified in desisting from pressing a claim waived by the individual who actually sustained injury, as Great Britain did in the Jencken claim against Spain. As will be noted presently, an international arbitral tribunal has regarded a private waiver of indemnity as a bar to an international claim.

In the Orinoco Steamship Company case, in considering the rights of the British stockholders, the British government took the view that its general international right of diplomatic interposition was not modified by the renunciatory clause contained in the concession of that company.²

The German government in a case which likewise arose in Venezuela did not consider itself bound by the renunciatory clause, taking the ground that the German government is not a party to these contracts. That government reserves the right to intervene diplomatically for the protection of its citizens whenever it considers it best to do so, "no matter what the terms of the contract, in this particular respect, are."³

¹ *Supra*, p. 372.

² Although, added the English government, the fact that the company had contracted themselves out of every remedial recourse in case of dispute is an element to be taken into consideration when they subsequently appeal for the intervention of his Majesty's Government. Ralston, 90.

³ Position of the German government as stated by the German minister at Caracas to Mr. Loomis, the American minister, Moore's Dig. VI, 300.

§ 375. Decisions of International Tribunals on Effect of Contractual Renunciation.

International commissions have had frequent occasion to construe the effect on the right of the claimant to ask the intervention of his government and of the government to intervene in a case where there has been an express renunciation of the right. In the case of Jarr and Hurst,¹ Palacio, the Mexican commissioner, speaking for the commission, held that the release of claimants from imprisonment on the understanding that no claim should be brought for the imprisonment, to which arrangement the American minister consented, operated as a bar to the claim.

For the most part, however, the occasions on which international commissions have had to construe the effect of a contractual renunciation of protection have involved the question of the validity of the Calvo clause, which, in contracts, generally reads:

"The doubts and controversies that may arise on account of this contract shall be decided by the competent tribunals of the Republic, in conformity with the laws, and shall not give rise to any international reclamation."

The clause is worded differently from time to time, sometimes stopping with the mere statement that the doubts shall be submitted to the local courts, with no further stipulation as to the renunciation of diplomatic protection. Sometimes such renunciation is added to the stipulation for exclusive jurisdiction of the local courts, with the proviso that cases of denial of justice are excepted. For the present purposes, all forms of the clause may be considered together, for in the cases that have arisen where the stipulation involved nothing further than exclusive submission to the local courts, the local remedies had not been exhausted.

Nor are the principles laid down seriously modified by the fact that the clause has not always been framed in identical language.

The decisions of various international commissions are by no means uniform. In the nineteen cases reported by Moore and Ralston, eight have upheld the clause as barring the right of the claimant to appear before an international commission without having fulfilled his obliga-

¹ Jarr and Hurst (U. S.) v. Mex., July 4, 1868, Moore's Arb. 2713.

tion under the stipulation, and eleven have denied the validity of the clause as barring the right of the claimant, or of his government, to bring the claim before an international commission, in spite of the fact that the obligation of the stipulation had not been fulfilled. One tendency is noticeable throughout. The commissions generally have sought to find a ground on which they could relieve the claimant from the binding character of the obligation contained in the clause.

§ 376. The Validity of Calvo Clause Upheld.

Two of the earliest cases in which the clause was construed came before the United States-Venezuelan commission of 1885. The contract in the case of Day and Garrison¹ provided for private arbitration of disputes under it and precluded by renunciation any international claim. The contracts were held invalid, but Findlay, the American commissioner, upheld the renunciatory clause on the ground that the provision for settlement by arbitration was "inconsistent with any attempt to make [disputes] cause for an international claim on any pretext whatever"—this in spite of the fact that the contracts had been annulled by a decree of Venezuela, which Commissioner Little, in a dissenting opinion, held to have closed the door to arbitration and therefore to bar the defendant from setting up the renunciation of national protection.

In the Flannagan case before the same commission,² Commissioner Findlay, for the commission, held the claimant bound by the stipulation for exclusive local jurisdiction, but expressed serious doubt as to whether the decisions of the local courts would stand free from international claim in case of a denial of justice. The dissenting opinion of Commissioner Little in that case³ has since become the starting point for the decisions of subsequent commissions denying the binding character of the clause in case of a subsequent agreement

¹ Day and Garrison (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 3548, 3563-64 (*dictum* only). The umpire of the 1866 commission had held that the decree annulling the provision as to arbitration, revived claimant's right to make the contract the subject of an international claim, in spite of the stipulation. Moore's Arb. 3563.

² Flannagan, Bradley, Clark & Co. (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 3564, 3565.

³ Moore's Arb. 3566; Report of the Commission, Washington, 1890, p. 451, Ralston, International arbitral law and procedure, Boston, 1910, p. 36.

by the two nations to submit the question to arbitration. A portion of his opinion on this point may be quoted:

"An agreement in my judgment between the United States and Venezuela to submit its claims to a Mixed Commission for decision according to justice, superseded and took the place of any previous understanding between the latter and the claimants, if any binding one existed, to submit them to any other tribunal for determination. . . . A contract between a sovereign and a citizen of a foreign country not to make matters of difference or dispute . . . the subject of an international claim . . . would involve *pro tanto* a modification or suspension of the public law. . . ."

which he considered beyond the competence of any individual. His government's

"rights and obligations in the premises cannot be affected by any precedent agreement to which it is not a party. Its obligation to protect its own citizen is inalienable."

In 1900 Secretary of State Hay declined to present the claim again to the government of Venezuela "until there has been a compliance with the aforesaid stipulation, resulting in a denial of justice."¹ The claim was, however, brought before the Venezuelan commission of 1903 in the Woodruff case.²

This was the first of four decisions in which the umpire, Dr. Barge of Holland, had an opportunity to construe the effect and validity of the renunciatory clause under protocols essentially the same, and in which his decisions varied to such an extent as completely to obscure the law. In this Woodruff case, Bainbridge, the American commissioner, approved the opinion of Mr. Little, quoted above in the Flannagan case. The Venezuelan commissioner, Paul, considered, as Commissioner Findlay had done in the 1885 commission, that the Calvo clause withdrew the claim from the jurisdiction of the commission. The umpire, Dr. Barge, held that the failure to comply with the stipulation conferring exclusive jurisdiction on the local courts barred the right of the claimant to appear before the commission, although, he added, the citizen could not impede the right of his government to bring an international claim, in case of denial or undue delay of justice.

¹ Mr. Hay, Sec'y of State, to Mr. Woodruff, Nov. 28, 1900, Moore's Dig. VI, 301.

² Woodruff (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 151, 160.

In the Rudloff case,¹ which was then pending before the local courts but had not yet been decided, Umpire Barge held that the stipulation for exclusive jurisdiction in the local courts did not prevent the commission from exercising jurisdiction, on the ground that the "absolute equity" clause² gave the commission the right to determine whether such stipulation operated inequitably. He considered that it did so operate and entertained jurisdiction, after doing which, he said, he could decide whether the failure to submit the case to the local courts affected the claim with a *vitium proprium*.

In the Orinoco Steamship case,³ Barge again held, after finding that the particular question under discussion was a "dispute" and that the rule of absolute equity could not permit the same contract being made "a chain for one party and a screw press for the other," that the parties having selected their own judges and renounced international reclamation, "absolute equity" did not allow the commission to recognize the claim.

In the Turnbull case,⁴ Umpire Barge made the most sweeping decision of all. He held that where the parties had "deliberately contracted themselves out of any interpretation of the contract" except by certain designated judges, and no such submission to or decision of these judges awarding damages had taken place, an international commission is precluded from taking jurisdiction of the claim. Mr. Moore pertinently remarks:

"It may be superfluous to remark that, according to this view, there can be no room whatever for international action, in diplomatic, arbitral, or other form, where the renunciatory clause exists, unless indeed to secure the execution of the judgment of a local court favorable to the claimant; for, if the parties have 'no right to claim' damages which the local courts have not found to be due, it is obvious that international action of any kind would be as inadmissible where there had been an adverse judgment, no matter how unjust it might be, as where there had been no judgment whatever."⁵

¹ Rudloff (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 182, 193.

² This clause reads: "The commissioners, or in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation."

³ Orinoco Steamship Co. (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 72, 91-92.

⁴ Turnbull (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 200, 245.

⁵ Moore's Dig. VI, 307. A good summary of the fluctuating position taken by

The binding character of the clause was upheld by the Anglo-Chilean commission of 1893 in the case of the Nitrate Railway Company,¹ in which it was held that the claimant had voluntarily accepted the concession and could agree to such stipulations as he desired; that the granting government in giving concessions, had the right to place foreigners on the same basis as its nationals; and that there is no principle of international law which forbids citizens to agree personally to contracts renouncing diplomatic action, although the stipulation, they added, does not "obligate foreign governments." That is, while his government may not be bound by the renunciatory clause, the citizen is, and the claim was dismissed.²

Plumley, umpire of the French-Venezuelan commission of 1902,³ stated that "he could not entirely ignore the restrictive features of the contract." He gave it partial effect, although evidently consciously restricting it to its narrowest limits, by stating that the question of damages under the operation of the contract is ulterior to the contract itself, and the renunciatory clause is inapplicable, covering, as it does, only the question of rescission. Paul, the Venezuelan commissioner in the Kunhardt case,⁴ upheld the validity of the clause although his conclusion to this effect was not involved in the final judgment.

Commissioner Wadsworth, speaking for the commission in the Tehuantepec ship canal case⁵ held that a stipulation to refer questions arising under the contract to private arbitration must be complied with in order to give an international commission jurisdiction over the case.

Umpire Barge in the interpretation of the renunciatory clause is given in Senate Document 413, 60th Cong., 1st sess. (1908), Correspondence relating to wrongs done to American citizens by the government of Venezuela, pp. 79-84.

¹ Nitrate Railway Company, Lim. (U. S.), *v.* Chile, Reclamaciones presentados al Tribunal Anglo-Chileno, Santiago, 1894-96, II, 320 *et seq.*, cited in Ralston's International arbitral law, 41.

² This is somewhat analogous to Umpire Barge's conclusions in the Woodruff case, Ralston, 160.

³ Plumley, Umpire in the French-Venezuelan Mixed Claims Commission of 1902, Senate Document, 533, 59th Cong., 1st sess. (1906), 367, at p. 445.

⁴ Kunhardt (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 63, 70 (*dictum*).

⁵ Tehuantepec Ship Canal Co. (U. S.) *v.* Mex., July 4, 1868, Moore's Arb. 3132-3133.

§ 377. The Validity of Calvo Clause Denied.

In the several international claims cases in which the binding character of the renunciatory clause has been denied and the claimant relieved from its inhibitions, there is evident an attempt to limit its application and to find grounds for denying its validity as a bar to an international claim. The grounds taken by international commissions to uphold the claimant's right to appeal to the international forum in spite of the renunciatory clause have been three: first, that it is beyond the competence of an individual to contract away the superior right of his government to protect him, as in the Rudloff and Martini cases before the Venezuelan Commissions of 1903; secondly, in cases where the government had annulled the contract without first appealing to the local courts, that such action relieves the claimant from the stipulation not to make the contract a subject of international claim, as in the Milligan case against Peru and the North and South American Construction Co. case against Chile; thirdly, wherever possible, the courts try to find that the claim arises not out of the contract itself, but out of some violation of property rights, thus basing the claim on tort, as in the Selwyn and the Rudloff cases.

It may be profitable to examine the cases somewhat more closely. The principle laid down in the Martini case and the learned opinion of Umpire Ralston is considered good law.¹

"The right of a sovereign power to enter into an agreement of this kind" (to submit to a mixed commission the claims of its citizens against another government) "is entirely superior to that of the subject to contract it away. It was, in the judgment of the umpire, entirely beyond the power of an Italian subject to extinguish the superior right of his nation, and it is not to be presumed that Venezuela understood that he had done so."

So in the Rudloff² case, Bainbridge, the American commissioner, said:

¹ Martini (Italy) v. Venezuela, Feb. 13, 1903, Ralston, 819-841. The opinion on this point seems to be *dictum*, inasmuch as the umpire decided that damages were due because of the closing of a port in violation of the contract and that the dispute was not within the terms "doubts and controversies which may arise in the interpretation or execution of the contract."

² Rudloff (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 183, 187. The opinion by Bainbridge on the question of jurisdiction is not the opinion of the commission,

"It is not within the power of a citizen to make a contract limiting in any manner the exercise by his own government of its rights or the performance of its duties" (the right and duty of protecting its citizens abroad). "The individual citizen is not competent by any agreement he may make to bind the state to overlook any injury to itself arising through him, nor can he by his own act alienate the obligation of the state toward himself, except by a transfer of his allegiance."

In the *Selwyn* case¹ the question under dispute was still pending in the local courts. Plumley, Umpire, stated that

"within the limits prescribed by the convention constituting it the parties have created a tribunal superior to the local courts,"

and it is not affected jurisdictionally by the fact that the question submitted for its decision is pending in the courts of one of the nations.²

The second class of cases embraces those in which the government has annulled the contract or some important term of it and then sought to estop the claimant by alleging the binding character of the renunciatory clause as a bar to the international claim. In such cases international courts have been apparently very willing to construe the breach by the government as relieving the claimant from his stipulation to be bound by the decision of the local courts and not to make the contract the subject of an international claim. They begin with the premise that the obligations of the clause bear equally and reciprocally upon both parties to the contract—the government and the claimant—and that when the government, without resort to the local tribunals, declares the contract null, the claimant is absolved from all obligations limiting his remedial rights.³ The basis for this decision, which finds ample support, bears an analogy to the rule of the Department which was rendered by the umpire, Barge. Bainbridge's opinion, however, appears not to have been contradicted by the umpire.

¹ *Selwyn* (Gt. Brit.) *v.* Venezuela, Feb. 13, 1903, Ralston, 322, 323.

² Barge, Umpire in the *Rudloff* case, in which a suit was likewise pending before the local courts also considered that the commission had jurisdiction, notwithstanding the pendency of the case in the local courts.

³ *Rudloff* (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 182, 183. See also opinion of Commissioner Little in the case of *Day and Garrison v. Venezuela*, Dec. 5, 1885, Moore's Dig. VI, 301-2. Commissioner Findlay, however, declined to give the annulment by the Government this effect in the *Flannagan* case before the 1885 Commission. Barge likewise refused to give it such effect in several cases before the 1903 U. S.-Venezuelan commission.

ment of State and international tribunals, to relieve the claimant, where there has been a confiscatory breach of contract, from the usual practice of a denial of interposition or jurisdiction in contract claims. Mr. Blaine, Secretary of State, in the case of *McMurdo*¹ stated that it is

“not within the power of one of the parties to an agreement first to annul it, and then to hold the other party to the observance of the conditions as if it were a subsisting agreement.”

The same rule was applied by the international commission which subsequently passed upon the claim.

In the North and South American Construction Co. case against Chile,² the fact that the government had failed to comply with the stipulation referring the claim to private arbitrators was held to relieve the claimant from his obligation not to invoke the protection of his own government in the enforcement of his rights. The American Commissioner, Vidal, in the *Milligan* case against Peru, likewise stated that through the annulment of the contract by the government of Peru, the claimant recovered the right which he had renounced to invoke the protection of his government.³ While Pino, the Peruvian commissioner, did not support Vidal in this decision, but considered the clause as a complete bar to the claim, Vidal's opinion seems to have prevailed, inasmuch as by subsequent agreement between the commissioners an award was made in favor of the claimant.

In the third class of cases, the international tribunal circumvented

¹ *McMurdo (U. S.) v. Portugal*, June 13, 1891, Moore's Arb. 1865 *et seq.*; Mr. Blaine, Sec'y of State, to Mr. Loring, Minister to Portugal, Nov. 30, 1889, Moore's Dig. VI, 297, Moore's Arb. 1870.

² *North and South American Construction Co. (U. S.) v. Chile*, Aug. 7, 1892, Moore's Arb. 2318-2322.

³ *Milligan (U. S.) v. Peru*, Dec. 4, 1868, Moore's Arb. 1643. In the case of *La Guaira Electric Light and Power Co. (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 178-182, Mr. Ralston, in his work on International arbitral law makes the statement that Commissioner Bainbridge, speaking for the commission, said that as to a part of the claim, it was not one “in which the government itself had violated a contract to which it was a party. In such a case, the jurisdiction of the commission under the terms of the protocol is beyond question.” In the *La Guaira Electric* case, however, the contract was not with the government at all, but with a municipality, for which reason the claim was dismissed. Moreover, there is no evidence from the case, as reported, that the contract contained the renunciatory clause.

the inhibitory effect of the renunciatory clause by holding that the subject of the claim arose not out of a "doubt or controversy" under the contract, but out of a deprivation of property rights or breach of contract or some other element which relieved the commission from directly construing the effect of the renunciatory clause.

So in the *Selwyn* case, Umpire Plumley based his decision upon the ground that

"the claim before him has in no particular to deal with any doubts and controversies . . . regarding the spirit or execution of the contract in which such terms appear. The fundamental ground of this claim as presented is that the claimant was deprived of valuable rights, of moneys, properties . . . and rights of property, by an act of the Government which he was powerless to prevent and for which he claims reimbursement . . . The fundamental feature of this claim . . . is not a matter of contract."¹

A somewhat similar conclusion was reached in the *Rudloff*, the *Martini*, and other cases before the Venezuelan mixed commissions sitting at Caracas in 1903.²

§ 378. Conclusions.

What conclusion may be drawn as to the effect of the renunciatory

¹ *Selwyn* (Gt. Brit.) *v.* Venezuela, Feb. 13, May 7, 1903, Ralston, 322.

² *Rudloff* (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 188. Umpire Ralston in the *Martini* case (Italy) *v.* Venezuela, Feb. 13, 1903, Ralston, 843 held that the closing of a certain port was a violation of the contract and not a doubt and controversy as to its interpretation and execution.

A similar conclusion was reached by Paúl, Venezuelan commissioner in the case of *Del Genovese* (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 174-178, in which the breach of the contract was apparently not held to be a "dispute and controversy."

So in the case of the *American Electric and Manufacturing Co.* (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 246-250, Barge, umpire, held that the breach of a collateral promise (to annul a previous concession granted to another) was not a "doubt and controversy" under the contract on which claim was brought. He then held, however, that as the promise to annul a previous concession, which also contained the Calvo clause, was in itself a promise to do an illegal act, the breach of such promise could not be made the basis of a claim. No two of Umpire Barge's decisions construing the renunciatory clause seem to be consistent with each other.

See also the cases of the *Antofagasta and Bolivia Railway Co.* (Gt. Brit.) *v.* Chile, Sept. 26, 1893, *Reclamaciones presentados al Tribunal Anglo-Chileno*, III, p. 699 at p. 788 *et seq.*; and *Robert Stirling* (Gt. Brit.) *v.* Chile, *ibid.* I, p. 128 at p. 152 *et seq.*, cited by Ralston in his *International arbitral law*, 42-43. See also *Cora and La Vela Ry. & Impr. Co.* (U. S.) *v.* Venezuela, Feb. 17, 1903, *Morris' Rep.* 69, 70.

clause? Great Britain, Germany, and the United States appear to have considered themselves not bound by its terms. Mr. Bayard expressly stated:

"The United States has uniformly refused to regard such provisions as annulling the relations existing between itself and its citizen or as extinguishing its obligations to exert its good offices in their behalf in the event of the invasion of their rights."¹

Furthermore, said Mr. Bayard in another connection:

"No agreement by a citizen to surrender the right to call on his government for protection is valid either in international or municipal law."²

A close analogy is found in the settled principle of municipal law by which stipulations in private contracts agreeing to resort to arbitration and renouncing judicial remedies are held invalid, on the ground that it is against public policy "to sanction contracts by which the protection which the law affords the individual citizen is renounced."³

The weight of authority supports the view that the mere stipulation to submit disputes to local courts is confirmatory of the general rule of international law and will be so construed by the national government of concessionaries. If, however, the renunciation goes so far as to preclude recourse to diplomatic protection, even in cases of denial of justice, the renunciation of protection will not be considered as binding upon the claimant's government; for, as in municipal law the private agreement cannot oust the jurisdiction of municipal courts, so in international law the private agreement cannot oust the interposition of international remedies. Again, if there has been a confiscatory breach of the contract by the government, the claimant will

¹ Mr. Bayard, Sec'y of State, to Mr. Hall, Minister to Central America, Mar. 22, 1888, For. Rel., 1888, I, 134, 137, with respect to the claim of the Champerico and Northern Transportation Co. v. Guatemala, growing out of an alleged violation by that government of its contract with the company. Moore's Dig. VI, 295. See also Mr. Wilson, Act'g Sec'y of State, to Mr. Hibben, Chargé, May 19, 1909, For. Rel., 1909, p. 222.

² Mr. Bayard, Sec'y of State, to Mr. Hill, Feb. 16, 1887, For. Rel., 1887, p. 100.

³ Delaware & Hudson Canal Co. v. Pa. Coal Co., 50 N. Y. 250, 258; National Contracting Co. v. Hudson River Water Power Co., 170 N. Y. 439, 442; Hamilton v. Liverpool, L. & G. Ins. Co., 136 U. S., 242, 254 (*dictum*). See R. Floyd Clarke in 1 A. J. I. L. (1907), 378 *et seq.*, and L. von Bar in his opinion in the case of Salvador Commercial Co. v. Salvador, 45 Jhering's Jahrbücher, 193.

be relieved from the stipulation barring his right to make the contract the subject of an international claim. While some arbitrators, notably Umpire Barge, have evolved the rule that the clause is binding upon the claimant, but not on his government, it is difficult to see how such an inconsistent rule can be applied,¹ and in fact these arbitrators have taken jurisdiction of claims in such circumstances and made awards. Finally, the right of the government to submit the claims of its citizens to an international tribunal, is, it may be concluded, superior to the right or competency of the individual to contract it away, for whatever the individual's power to renounce a personal right or privilege, he does not represent the government and is, therefore, incompetent to renounce a right, duty, or privilege of the government. In sum total, therefore, the better opinion seems to be that the renunciatory clause is without any effect so far as any changes or modifications in the ordinary rules of international law are concerned.

IMPLIED RENUNCIATION OF PROTECTION

§ 379. Various Acts from which Renunciation is Implied.

It will have been observed in the discussion of expatriation, express and implied,² and of censurable conduct as a method of forfeiting protection,³ that there are numerous ways in which protection may be renounced by implication. During the latter half of the nineteenth century, the long-continued residence of native citizens abroad was regarded as a voluntary renunciation of protection.⁴ Even when it was admitted that such foreign residence did not effect expatriation, the Department of State was guided largely by Secretary Fish's theory, that "citizenship involves duties and obligations, as well as rights. The correlative right of protection by the Government may be waived or lost by long-continued avoidance and silent withdrawal from the performance of the duties of citizenship, as well as by open renunciation."⁵

Since the improvement in the facilities for communication and

¹ Mr. Bayard correctly stated that "to deny to a foreigner recourse to his Government by necessary implication questions and denies the right of that Government to intervene." Mr. Bayard to Mr. Hall, Nov. 29, 1886, For. Rel., 1887, p. 80.

² *Supra*, §§ 319, 325 *et seq.*

³ *Supra*, §§ 337 *et seq.*

⁴ Moore's Dig. III, § 474.

⁵ Mr. Fish, Sec'y of State, to Mr. Niles, Oct. 30, 1871, Moore's Dig. III, 762.

transportation and the increase of international intercourse, it has been admitted that foreign domicile no longer has the same significance as in former years. With a view to establishing on a more just basis the right of a citizen domiciled abroad to the protection of this government, the Department of State in a circular of July 26, 1910, entitled "Protection of native citizens abroad," fixed upon certain tests and presumptions, which, upon application to particular cases, are intended to establish whether the citizen has definitely identified himself with a foreign country and impliedly renounced his right to American protection.¹ One of the most important factors in determining that the citizen abroad has impliedly renounced his right to protection is his failure to register in an American consulate.²

In the case of naturalized citizens, protracted residence abroad frequently resulted in a presumption of abandonment of their acquired American citizenship and protection. In the absence of statutory rules, prior to 1907, each case had to be determined upon its own merits in the exercise of departmental discretion. The *intent* to abandon American citizenship was in each case sought to be established, and numerous tests and criteria were applied in the determination of this intent. Departure from the United States soon after naturalization and a return to the native country for apparently permanent residence usually resulted in a presumption of renunciation of naturalization,³ although evidence was permitted by which the presumption might be overcome. When it was apparent that the naturalization was obtained not with any real design of establishing a permanent residence in the United States, but for the purpose of going abroad and using the advantages of American citizenship, while evading its duties and responsibilities, a presumption of fraud was created.⁴ While it is not always clear that expatriation was deemed to follow residence abroad—there being indeed much doubt whether the executive was empowered to denationalize a citizen—protection was uniformly withdrawn. The Act of March 2, 1907 has greatly

¹ *Supra*, § 328.

² *Supra*, pp. 689, 723.

³ *Supra*, § 330, Moore's Dig. III, §§ 470, 475.

⁴ *Supra*, pp. 663, 720, 732.

simplified the extension of diplomatic protection to naturalized citizens by providing that two years' residence in the native country or five years' residence in a third country shall establish a presumption of expatriation, and the circular of April 19, 1907 sets forth the various ways in which this presumption may be overcome.¹ Almost all the naturalization treaties of the United States provide that a two years' residence in the native country shall create a presumption of intent to renounce American citizenship.²

Reference has been made on several occasions³ to the Anglo-American doctrine of belligerent domicile, according to which the enemy or neutral character of property at sea is judged by the so-called commercial domicile of its owner, rather than by his political allegiance. His personal disposition toward the belligerents is immaterial.⁴ Moreover, property engaged in the commerce of the hostile power is legitimate prize, without regard to the domicile of the owner.⁵ Again, the property on land of a person domiciled in belligerent territory, and property there situated regardless of the owner's domicile, is subject to the risks of war.⁶ A person domiciled in enemy territory may properly be regarded as an enemy.⁷ The failure of a neutral to take early steps to remove from belligerent territory has been held to constitute an abandonment of the right to claim the protection of the government to which his original and permanent allegiance is due.⁸ A similar result naturally follows the entrance of a neutral into belligerent territory after knowledge of the existence of war.⁹

¹ *Supra*, § 331.

² *Supra*, §§ 239, 241.

³ *Supra*, pp. 110, 253, 559, Moore's Dig. VII, § 1189.

⁴ *Mrs. Alexander's Cotton*, 2 Wall. 404, 419; *The Benito Estenger*, 176 U. S. 568, Moore's Dig. VII, § 1190.

⁵ *The Prize Cases*, 2 Black. 635.

⁶ *Supra*, pp. 114, 225. Brief of W. E. Fuller before Spanish Treaty Claims Commission, case of Teresa Jeorg v. U. S., Briefs, II, 125.

⁷ Hall, 491; Davidson (*Gt. Brit.*) v. U. S., May 8, 1871, Moore's Arb. 3738, Hale's Rep. 43. Frazer's dissenting opinion on forfeiture of protection, concurred in by presiding commissioner.

⁸ *Clow (U. S.) v. Mexico*, Act of March 3, 1849, Moore's Arb. 2658; Cooke, *ibid* 2660; Haggerty, *ibid*. 2663; Thompson, *ibid*. 2667.

⁹ *Thompson (U. S.) v. Mexico*, *ibid*. 2669.

In all these cases of belligerent domicil, there is an implied renunciation of the protection of the national government of the person or of the owner of the property, in so far as the lawful exercise of belligerent rights against him is concerned. Good offices, however, are frequently employed in an endeavor to secure a fair trial before prize courts or the proper exercise of belligerent rights.

The engagement of an American vessel in the coasting trade of a foreign country, which reserves such trade to national vessels, or the employment of an American vessel in the service of a foreign power as auxiliary to military or naval operations has been regarded as an election to rely exclusively upon the protection of the foreign country and to waive any claim to the protection of the United States.¹

It has already been observed in previous sections² that the censurable conduct of a claimant in certain cases operates as a forfeiture of diplomatic protection. The acts there discussed such as the inequitable conduct of the claimant generally, concealment of citizenship, the presentation of a fraudulent claim, the evasion of national duties, and the violation of municipal or international law in its various phases may likewise be regarded as involving an implied renunciation of protection.

§ 380. Effect of Accepting Public Office or Employment Abroad.

Whether the acceptance of a public office or employment from a foreign government may be construed as an implied renunciation of American protection depends very much upon the nature of the employment, whether political or not, and upon its consistency with the retention of American citizenship. Thus, where an unqualified oath of allegiance is required,³ or where the employment is of an essentially political character,⁴ protection is considered to be renounced.

¹ *Supra*, p. 770, Moore's Dig. II, § 328, particularly Mr. Fish, Sec'y of State, to Mr. Bassett, Sept. 15, 1869, p. 1073.

² *Supra*, § 337 *et seq.*

³ Lacayo's case, For. Rel., 1893, 184-185. When the military service actually involves naturalization abroad American protection is impliedly renounced. Smith's case in Mexico, Mr. Seward to Mr. Foster, August 13, 1879, For. Rel., 1879, p. 824.

⁴ *Corvaia (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 808. While this decision is not, of course, binding upon the United States, it will be recalled that among the important tests for determining the right to protection and true allegiance of a

While the United States does not prohibit its citizens from taking military service abroad, nor withdraw protection from them if they are inhumanly treated, it will, for their ordinary protection while serving under a foreign flag, leave them to the protection of the state which they serve. The United States will take no cognizance of their death in battle, or the unusual inconveniences they may suffer as belligerents. If, however, they take an oath of allegiance to the state which they serve, they have expatriated themselves under the Act of March 2, 1907. It has already been observed that the acceptance of military service abroad, without the consent of the national government has in many European countries the effect of expatriation and in all them involves a loss of national protection during the continuance of the service.¹ Acting Secretary Uhl even believed that employment by a foreign government as a detective, custom-house officer or police captain raised "serious doubts whether [the citizen] can rightfully claim, as against that country, the protection of his original nationality."² Upon a claim for a pension to which an American citizen alleged he had become entitled by service to a foreign government, the Department replied: "As a rule, the Department refrains from pressing claims growing out of employments, voluntarily accepted by American citizens under foreign governments."³ In the Corvaia claim against Venezuela, in which there was an acceptance by an Italian subject of a diplomatic office from Venezuela, the Italian law providing that Italian nationality was thereby lost, Umpire Ralston held that both the claimant and his government were estopped from prosecuting the claim against Venezuela.⁴ On the other hand, the

native American, long resident abroad, is participation in the politics of his country of residence, and acceptance of political office would operate strongly against him.

¹ Oppenheim, II, § 322; Mr. Fish, Sec'y of State, to Mr. Williams, July 29, 1874, For. Rel., 1874, p. 300; *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 438 (the claim was not connected with the military service). See also Marcel Nast on the French law in 62 Rev. crit. de législation (1913), 340-365 and Von Bar in Gillespie's trans., 2nd ed., § 59.

² Mr. Uhl, Act'g Sec'y of State, to Mr. Willis, May 14, 1895, For. Rel., 1895, II, 854.

³ Mr. Blaine, Sec'y of State, to Mr. Moffit, June 20, 1890, Moore's Dig. VI, 717.

⁴ It is the Department's policy not to press claims for military service or pensions, *supra*, p. 301.

⁵ *Corvaia (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 808 (partly *dictum*).

appointment of an American citizen as Vice-Consul of a foreign country, which does not require an unqualified oath of allegiance, a rule which also prevails in the American consular service, is not regarded as a renunciation of American citizenship or protection.¹ Various treaties concluded among the Latin-American states provide that the fulfillment of public functions involves assimilation to nationals and the loss of the rights of alienage.²

The acceptance of minor employment of a non-political character³ or of a minor municipal office,⁴ or the express reservation and recognition by the foreign government of original nationality,⁵ will not be considered as involving a renunciation of diplomatic protection.

The acceptance of public office abroad may serve as one of the tests in connection with other circumstances by which identification with the foreign country and the loss of the right to American protection are determined. In this sense, the acceptance of a title of nobility from a foreign government is a circumstance to be considered.⁶ In the case of a naturalized citizen, the acceptance of public office from his native government was used, prior to the Act of 1907, as one of the tests to determine his intent to abandon his adopted citizenship, and in connection with other circumstances, such as residence abroad and establishment in business, has served to relieve this government from the duty of protecting him.⁷

The exercise of political rights or participation in politics in a for-

¹ The Department has on several occasions ruled that the assumption of consular duties for a foreign government will not deprive a citizen of the U. S. of his American citizenship. See, under the former law when oath of allegiance did not involve expatriation, *Fish v. Stoughton*, 2 Johns. Cases, 407.

² Tchernoff, *op. cit.*, 210-211, citing certain treaties.

³ *Giordana (Italy) v. Venezuela*, *ibid.*, cited Ralston, 797 (assistant engineer in the ministry of public works); *Cole (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2468 (artisan in the repair of gun carriages, *dictum*). Nor is British protection forfeited under such circumstances, *Panama Riot Claims*, Naturalization Rep. App. 64.

⁴ *Burchard's case*, Sec'y Evarts to Mr. Logan, Sept. 19, 1879, For. Rel., 1880, 107; Mr. Hill, Ass't Sec'y of State, to Mr. Lombard, May 12, 1900, Moore's Dig. III, 785; Mr. Uhl, Act'g Sec'y of State, to Mr. Weil, Oct. 4, 1894, *ibid.* 784.

⁵ *Robert (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 2477.

⁶ Mr. Bacon, Act'g Sec'y of State, to Mr. Bryan, May 16, 1907, For. Rel., 1907, II, 957. Mr. Bacon regarded it as one of the tests of "expatriation."

⁷ Secretaries Fish and Frelinghuysen, quoted in Moore's Dig. III, 766, 781, 782.

eign country may amount to an implied renunciation of diplomatic protection, if it involves an identification with the foreign government,¹ and at all events may serve as one among several criteria to determine whether the right of protection has been lost. Where political rights are conferred on aliens generally, there is no loss of protection. When conferred on and exercised by those who have declared their intention of becoming citizens, the question is more doubtful. This is frequently the case in the United States, and it would seem that it is for the protecting government to determine whether these persons, who in strict law are aliens, have lost their right to diplomatic protection. In the American Civil War, when such persons were drafted for service, Great Britain first insisted upon their exemption and then upon their right to leave the United States, but informed their subjects that it could not extend its protection if they persisted in residing in the United States. France, however, asserted the right to protect its subjects under these circumstances.²

¹ Moore's Dig. III, § 480; Tchernoff, *op. cit.*, 210-211.

² Calvo, II, §§ 674, 675; Tchernoff, *op. cit.*, 206-207.

CHAPTER V

FORFEITURE OF PROTECTION BY ACT OF CITIZEN—Continued

FAILURE OF PROPER RECOURSE TO JUDICIAL REMEDIES

FAILURE TO EXHAUST LOCAL REMEDIES

§ 381. Application of General Rule.

The principle of international law by virtue of which the alien is deemed to tacitly submit and to be subject to the local law of the state of residence implies as its corollary that the remedies for a violation of his rights must be sought in the local courts. Almost daily the Department of State has occasion to reiterate the rule that a claimant against a foreign government is not usually regarded as entitled to the diplomatic interposition of his own government until he has exhausted his legal remedies in the appropriate tribunals of the country against which he makes claim. There are several reasons for this limitation upon diplomatic protection: first, the citizen going abroad is presumed to take into account the means furnished by local law for the redress of wrongs; secondly, the right of sovereignty and independence warrants the local state in demanding for its courts freedom from interference, on the assumption that they are capable of doing justice; thirdly, the home government of the complaining citizen must give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid, if possible, all occasion for international discussion; fourthly, if the injury is committed by an individual or minor official, the exhaustion of local remedies is necessary to make certain that the wrongful act or denial of justice is the deliberate act of the state; and fifthly, if it is a deliberate act of the state, that the state is willing to leave the wrong un-

righted. It is a logical principle that where there is a judicial remedy, it must be sought. Only if sought in vain and a denial of justice established, does diplomatic interposition become proper.¹ The Department of State has invoked the rule on innumerable occasions both in the case of claims of foreigners against the United States² and of American citizens against foreign countries.³ One of the best statements of the rule and its reason was made by Secretary of State McLane in 1834:

"Although a government is bound to protect its citizens, and see that their injuries are redressed, where justice is plainly refused them by a foreign nation, yet this obligation always presupposes a resort, in the first instance, to the ordinary means of defence, or reparation, which are afforded by the laws of the country in which their rights are infringed, to which laws they have voluntarily subjected themselves by entering within the sphere of their operation, and by which they must consent to abide. It would be an unreasonable and oppressive burden upon the intercourse between nations, that they should be compelled to investigate and determine, in the first instance, every personal offence, committed by the citizens of the one against those of the other."⁴

¹ The principle is so thoroughly established that the detailed citation of authorities seems hardly necessary. See, however, Vattel, Bk. II, ch. VIII, § 103. Fiore, *Dr. int. cod.*, 4th ed., § 537; Pradier-Fodéré, *Cours de droit diplomatique*, Paris, 1899, I, 524 *et seq.*; Tchernoff, 265 *et seq.*; Calvo, II, § 674; Seijas, I, 77-80; Phillimore II, 4; Lomonaco, 218. See also an excellent discussion of C. C. Hyde before the Lake Mohonk Conference, 20th Report (1914), 125-131.

² Citations from opinions of Attorneys General and state papers in Moore's Dig. VI, § 987, Wharton, II, § 241, and quotations from Jefferson and Clay, Moore's Dig. VI, p. 652. See also Mr. Bayard, Sec'y of State, to Mr. West, June 1, 1885, *For. Rel.*, 1885, pp. 453, 456, 458; Earl Granville to Mr. Adams, Sept. 25, 1884, 75 *St. Pap.* 1042, 1047; *Practice of the Netherlands* in Pradier-Fodéré, *Cours de dr. dip.* I, 524, note.

³ Extracts printed in Moore's Dig. VI, § 987 and Wharton, II, § 241. See also Mr. Gresham, Sec'y of State, to Mr. Hevner, June 10, 1893, Moore's Dig. VI, 271, 282. When a government affords what appears to be an adequate judicial remedy against itself, the U. S. will usually require claimants to avail themselves of it. For example, Latin-American countries have frequently established domestic claims commissions to adjudicate upon the claims of foreigners arising out of revolutions. The Department of State, *e. g.*, advised American citizens to present their claims arising out of the revolutionary disturbances in Mexico, in 1911, to the Consultative Claims Commission established by the Mexican government. Foreign governments are not necessarily bound by the decisions of these domestic tribunals.

⁴ Mr. McLane, Sec'y of State, to Mr. Shain, May 28, 1834, Moore's Dig. VI, 259 and again at 658.

The application of the rule that local remedies must be exhausted before an international claim may properly be instituted has served to dismiss many cases brought before international tribunals.¹ However, a number of arbitral awards have expressly dispensed with the requirement of exhausting local remedies, not for the reason that the local remedy was illusory or unsatisfactory (different illustrations of which will be discussed presently) but on jurisdictional grounds, the arbitrators reasoning that by the submission of the case to arbitration the two governments must have intended to confer jurisdiction upon the tribunal and supersede the local remedy.² It was, therefore, expressly provided in the protocol of arbitration between France and Venezuela of Feb. 11, 1913 that claimants must prove a resort to Venezuelan courts and an undue delay of justice (fifteen months without a decision) or an objection to the municipal decision by the

¹ Baldwin (U. S.) v. Mexico, April 11, 1839, Moore's Arb. 3126; Turner, *ibid.* 3126; Wilson (U. S.) v. Mexico, March 3, 1849, *ibid.* 3021; Medina (U. S.) v. Costa Rica, July 2, 1860, *ibid.* 2317; Pacific Mail (U. S.) v. Colombia, Feb. 10, 1864, *ibid.* 1412; People of Cinecua (Mexico) v. U. S., July 4, 1868, *ibid.* 3127; Selkirk (U. S.) v. Mexico, *ibid.* 3130, Tehuantepec Ship Canal, *ibid.* 3132, Leichardt, *ibid.* 3133, Jennings *et al.*, *ibid.* 3135, Black *et al.*, *ibid.* 3138, Green, *ibid.* 3139, Burn, *ibid.* 3140, Slocum, *ibid.* 3140, Pratt, *ibid.* 3141, Clavel, *ibid.* 3141, Ada, *ibid.* 3143, Ana, *ibid.* 3144, Smith, *ibid.* 3146, Nolan, *ibid.* 3147, Cramer, *ibid.* 3250, McManus, *ibid.* 3411; Danford (U. S.) v. Spain, Feb. 12, 1871, *ibid.* 3148; Brig *Napier* (Gt. Brit.) v. U. S., May 8, 1871, *ibid.* 3152-3159 (prize case); Hubbell (U. S.) v. Great Britain, *ibid.* 3484; Driggs (U. S.) v. Venezuela, Dec. 5, 1885, *ibid.* 3160, Corwin, *ibid.* 3210; Oberlander and Messenger (U. S.) v. Mexico, March 2, 1897, For. Rel., 1897, 370 at 382 *et seq.*, Sen. Doc. 73, 55th Cong., 3rd sess., 85, 125; French spoliation cases, Gray v. U. S., 21 Ct. Cl. 340; Ship *Tom*, 29 Ct. Cl. 68; Brig *Freemason*, 45 Ct. Cl. 555; La Guaira L. and P. Co. (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 182; De Caro (Italy) v. Venezuela, Feb. 13, 1903, *ibid.* 810; Comp. General of the Orinoco (France) v. Venezuela, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 244.

² See opinion of Day, Arbitrator, in Metzger (U. S.) v. Haiti, Oct. 18, 1899, For. Rel., 1901, 262, 275; Young, Smith and Co. (U. S.) v. Spain, Feb. 12, 1871, Moore's Arb. 3148; Trumbull (Chile) v. U. S., Aug. 7, 1892, *ibid.* 3569; Davy (Gt. Brit.) v. Venezuela, Feb. 13, 1903, Ralston, 410; Aroa Mines (Gt. Brit.) v. Venezuela, Feb. 13, 1903, *ibid.* 359 (*dictum*); Hoffman (U. S.) v. Mexico, March 3, 1849, Opin. 359 (not in Moore). In Moses (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3127 and Manasse (U. S.) v. Mexico, *ibid.* 3463, two cases decided by Lieber, Umpire, the grounds of decision are not convincing. The British-American commission of 1871, assumed jurisdiction, notwithstanding failure to resort to local remedies in Crutchett (Gt. Brit.) v. U. S., May 8, 1871, Moore's Arb. 3734, Braithwaite, *ibid.* 3737, and Knowles, *ibid.* 3748. See also the *Sally*, Hays (U. S.) v. Great Britain, Nov. 19, 1794, *ibid.* 3101-3119.

French government.¹ The construction placed by arbitral courts upon the so-called Calvo clause, by the terms of which a claimant undertakes by contract (usually with the government) to resort to the local courts to the exclusion of diplomatic intervention, has already been fully considered.² Article III of the Terms of Submission of the British-American Arbitration under the agreement of August 18, 1910 very justly provides:

"The Arbitral Tribunal shall take into account as one of the equities of a claim to such extent as it shall consider just in allowing or disallowing a claim, in whole or in part, any failure on the part of the claimant to obtain satisfaction through legal remedies which are open to him or placed at his disposal, but no claim shall be disallowed or rejected by application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity of the claim."³

§ 382. Position of Latin-America.

The Latin-American states have contended vigorously for the adoption by European states of the principle that an exhaustion of local remedies and the establishment of a denial of justice are conditions precedent to the exercise of diplomatic interposition. The principle has been incorporated into their constitutions, statutes and Pan-American conventions, and has found expression in a number of treaties between the states of Europe and Latin-America.⁴ Mexico appears to have had little difficulty in negotiating such treaties. Neither the United States nor Great Britain appears to have consented to enter into such a treaty stipulation with a Latin-American state.⁵ The Latin-American countries have concluded many treaties of this kind among themselves.⁶

¹ Protocol between France and Venezuela, Feb. 11, 1913, art. II, 7 A. J. I. L. (Suppl.), 218.

² *Supra*, §§ 375-377.

³ Malloy's Treaties, III, 55.

⁴ *Infra*, § 390 *et seq.* See also art. 2 of the convention for the establishment of a Central American Court of Justice, Dec. 20, 1907. Malloy's Treaties, II, 2400. See *Diaz v. Guatemala*, 39 Clunet (1912), 274.

⁵ Except in so far as such a limitation is contained in art. 10 of the treaty of Aug. 1, 1911 between Great Britain and Bolivia, Treaty series, 1912, 223.

⁶ Pradier-Fodéré, § 1370.

While these states have invoked their sovereignty and independence as a legal justification for insisting on the duty of aliens to exhaust local remedies and to refrain from calling upon the diplomatic protection of their own governments until a denial of justice in the courts is shown, they have not succeeded in securing a definite acceptance of this principle by the states of Europe. The European countries and the United States, invoking the right to protect their subjects abroad, upon which right the municipal law of Latin-America, they assert, can place no limitation, pass upon each case as it arises and determine for themselves whether it appears probable that a resort to local courts will afford an adequate remedy. Their unwillingness to remit their citizens unreservedly to the local courts of the more backward states of Latin-America seems to arise out of a lack of confidence in the impartiality of those courts and in their disposition to accord justice to the foreigner.¹ This attitude of Europe is especially noticeable in cases where the Latin-American government is a party to the litigation. In a recent agreement between France and Venezuela for the settlement of certain claims of French citizens against Venezuela, it has been expressly provided, that after the adjudication of the Venezuelan courts upon a claim, France shall have the right to object to the decision and submit the claim to an arbitral commission.² It is quite probable that with the growth of the weaker Latin-American countries in political stability, and, incidental thereto, an increasing confidence on the part of foreign countries in the impartiality and independence of the judiciary, foreign countries will give evidence of a greater willingness to submit the rights of their citizens and subjects to the decisions of the local courts, and to decline diplomatic interposition until local remedies have been exhausted.

§ 383. Qualifications of the Rule. When Unnecessary to Exhaust Local Remedies.

The rule that local remedies must be exhausted before diplomatic interposition is proper is in its application subject to the important condition that the local remedy sought is obtainable and is effect-

¹ *Infra*, §§ 390 *et seq.*, 396.

² Protocol between France and Venezuela, Feb. 11, 1913, art. II, *Journal Officiel*, June 17, 1913, p. 5198, printed in 7 A. J. I. L. (supplement), 218.

tive in securing redress. If this condition is absent, it would be futile and an empty form to require the injured individual to resort to local remedies. As Secretary of State Fish tersely remarked: "A claimant in a foreign state is not required to exhaust justice in such state when there is no justice to exhaust."¹ So, where the local tribunals are of such a nature that no confidence may be placed in them and no hope may be entertained of obtaining justice from them,² or where there are no duly established courts to which resort is "open and practically available,"³ it is unnecessary to exhaust local remedies.

It is not easy to determine when a citizen injured abroad is to be remitted to his local remedies and when the government may make his case the subject of immediate diplomatic action. In a general way, this may be said to depend upon whether he has an effective remedy in the local courts, and upon whether the injury is of a nature sufficiently flagrant to warrant immediate diplomatic action without requiring a preliminary resort to or exhaustion of local remedies. The difficulty of stating any general rule arises from the fact that the claimant's government determines in its discretion which method of procedure is under the circumstances proper.⁴ In cases of wrongful arrest and false imprisonment by local authorities, the absence of any uniform rule is particularly apparent.⁵

¹ Mr. Fish, Sec'y of State, to Mr. Pile, May 29, 1873, Moore's Dig. VI, 677.

² Lord Palmerston on the *Don Pacifico* case *v. Greece*, Hansard, Parl. Deb. cxii, 381-383, 387; Mr. Everett, Sec'y of State, to Mr. Marsh, Feb. 5, 1853, in case of *Dr. King v. Greece*, Moore's Dig. VI, 262-264.

³ Mr. Bayard, Sec'y of State, to Mr. Buck, Min. to Peru, Nov. 1, 1886, Moore's Dig. VII, 267; Mr. Fish, Sec'y of State, to Mr. Foster, Aug. 15, 1873, *ibid.* 678; *Gray v. U. S.*, 21 Ct. Cl. 340.

⁴ Mr. Bayard, Sec'y of State, to Mr. Morgan, April 27, 1886, H. Ex. Doc. 328, 51st Cong., 1st sess., p. 47; Mr. Blaine, Sec'y of State, to Mr. Shannon, Apr. 6, 1892, *For. Rel.*, 1892, p. 34 *et seq.*; Lord Salisbury to Mr. St. John, Aug. 21, 1885, 77 St. Pap. 1212. Cases of illegal capture of vessels often dispense with requirement of exhausting local remedies. *Cushing v. U. S.*, 22 Ct. Cl. 1, 44.

⁵ Resort to local remedies was apparently considered unnecessary in *Mevs case v. Haiti*, Moore's Dig. VI, 768; in case of Angell, Thomas and Pardee *v. Guatemala*; *Master of Russian bark Hans v. U. S.*; *Hale's case v. Argentina*; and *Lillywhite case v. Great Britain*, *ibid.* 768-769. It was insisted upon, however, in *Warren's case in Ireland* (*ibid.* 661) and in other cases in England, France and Honduras (*ibid.* 670-671).

The requirement of exhausting local remedies has been dispensed with as unnecessary by the Department of State when the action of the higher officials or authorities of the foreign government causing the injury has been arbitrary and unjust, and there appeared to be no adequate ground for believing that a sufficient remedy was afforded by judicial proceedings.¹ The same principle has been applied by international arbitral commissions.²

Where recourse to or the prosecution of an appeal before the local courts appears useless or impracticable in affording a claimant relief, he has been excused from appealing to or exhausting his local remedies. This has been held in cases where the local courts were prohibited from entertaining jurisdiction of suits against the state;³ where the judges were menaced and controlled by a hostile mob;⁴ where the payment of a possible judgment was entirely a matter of discretion with the defendant government;⁵ or where an appeal to the highest court from the circumstances of the case appeared impracticable.⁶ In these cases the resort to local courts would not have resulted in an effective remedy. In a few prize cases, it has been held that in face of a uniform course of decisions in the highest courts, a reversal

¹ Mr. Hay, Sec'y of State, Oct. 25, 1901 in Venezuela, *Asuntos Internacionales*, 1903, 177; Mr. Frelinghuysen, Sec'y of State, to Mr. Morgan, May 19, 1884, and Mr. Bayard, Sec'y of State, to Mr. Jackson, July 20, 1885, Moore's Dig. VI, 679; Same to same, Sept. 7, 1886, *ibid.* 680; Mr. Cadwalader to Mr. Foster, Sept. 22, 1874, *ibid.* 678. See also 77 St. Pap. 1212 and 1225 and Akerman, Atty. Gen., in 13 Op. Atty. Gen. 547, 550.

² *Moses (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3127; *Grannan (U. S.) v. Peru*, Dec. 4, 1868, *ibid.* 1652; *Johnson (U. S.) v. Peru*, *ibid.* 1656; *Davy (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 410.

³ *Ruden (U. S.) v. Peru*, Dec. 4, 1868, Moore's Arb. 1653, 1655; *Grannan (U. S.) v. Peru*, *ibid.* 1652; *Johnson (U. S.) v. Peru*, *ibid.* 1656; *dictum* in *Fretz (U. S.) v. Colombia*, Feb. 10, 1864, *ibid.* 2560; *North and South Amer. Construction Co. (U. S.) v. Chile*, Aug. 7, 1892, *ibid.* 2318 (arbitrary suppression of local remedy). See also *supra*, p. 339.

⁴ *Grannan (U. S.) v. Peru*, *ibid.* 1652, *Johnson*, *ibid.* 1656.

⁵ *The Neptune (U. S.) v. Great Britain*, Nov. 19, 1794, Moore's Arb. 3076-3100.

⁶ This ruling has been made on several occasions in prize cases. *Ship Governor Bowdoin v. U. S.* (French Spoiliations Act of Jan. 20, 1885, 36 Ct. Cl. 338; appeal court 9,000 miles distant); *Ship Tom v. U. S.*, 29 Ct. Cl. 68; *Carmalt (Gt. Brit.) v. U. S.*, May 8, 1871, Hale's Rep. 90, Moore's Arb. 3157; *McLennan (Gt. Brit.) v. U. S.*, *ibid.* 3158. See also the *Peggy*, 1 Cranch, 103, 107.

of the condemnation being hopeless, an appeal was excused;¹ but this rule was most strictly construed, and if a substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief.² Where the question is presented as to whether the government of a country has discharged its duty in rendering local protection to the citizens of another nation, the United States has contended that that government cannot be the final judge of its own conduct.³

A palpable denial of justice in the lower courts has on several occasions been held by the Department of State⁴ and by arbitral tribunals⁵ to relieve a claimant from the necessity of exhausting his local remedies.

A claimant is not, however, relieved from exhausting his local remedies by alleging his inability, through poverty, to meet the expenses involved;⁶ his ignorance of his right of appeal;⁷ the fact that he acted on the advice of counsel;⁸ or a pretended impossibility or uselessness of action before the local courts.⁹

We have already adverted to the attempts of the states of Latin-American to restrict aliens to their recourse to the local courts. When foreign governments deem the conditions of such recourse too onerous,

¹ Kane's notes on commission of July 4, 1831 between U. S. and France, Moore's Arb. 4472; *Bark Jones (U. S.) v. Great Britain*, Feb. 8, 1853, *ibid.* 3046.

² *Schooner Peggy*, 1 Cranch, 103, 107; *Ship Tom*, 39 Ct. Cl. 290; *Brig Freemason*, 45 Ct. Cl. 555, 560.

³ Mr. Blaine, Sec'y of State, to Mr. Dougherty, Jan. 5, 1891, Moore's Dig. VI, 805.

⁴ Mr. Bayard, Sec'y of State, to the President, Feb. 26, 1887, Moore's Dig. VI, 667; Mr. Bayard, to Mr. Copeland, Feb. 23, 1886 (*dictum*), *ibid.* 699; Mr. Marcy, Sec'y of State, to Mr. Clay, May 24, 1855, *ibid.* 659; Mr. Fish, Sec'y of State, to Mr. Pratt, March 20, 1875, *ibid.* 661.

⁵ *Glenn (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3138 ("general unsympathetic attitude of the lower court"); Prize cases (*Gt. Brit.) v. U. S.*, May 8, 1871, *ibid.* 3152, 3159 (misfeasance or default of capturing government in preventing appeal, *dictum* by Frazer, commissioner); *Montano (Peru) v. U. S.*, Jan. 12, 1863, *ibid.* 1630, 1634.

⁶ Mr. Adee, Act'g Sec'y of State, to Signor Carignani, Oct. 10, 1901, For. Rel., 1901, 310; Mr. Olney, Sec'y of State, to Mr. Dessaw, Nov. 19, 1896, Moore's Dig. VI, 670; *Gravely (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3158; *McLeod, ibid.* 3158; *Horton, ibid.* 3158; *Napier (U. S.) v. Great Britain, ibid.* 3152.

⁷ *Carson (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3157; *Creighton, ibid.* 3158.

⁸ *Heycock (Gt. Brit.) v. U. S.*, May 8, 1871, Moore's Arb. 3157.

⁹ *Diaz v. Guatemala*, Central American Court of Justice, 39 *Clunet* (1912), 274.

e. g., as in the case of the Venezuelan law of Feb. 14, 1873, or consider the local remedy provided as insufficient to afford the necessary relief or redress, they will not regard their citizens as bound to resort to or exhaust their local remedies, but will in their discretion make the claim a subject of diplomatic negotiation.¹

When the two governments have by agreement made a pecuniary claim the subject of diplomatic negotiation the claimant is considered as relieved of the necessity of having recourse to the local courts, unless his own government so consents and directs.² It has already been observed that an agreement to arbitrate has been construed as having the same effect.³ The agreement is deemed to withdraw the case from the courts, the local remedy being superseded by the international remedy. Even apart from any agreement, when a citizen has appealed to his government for protection and the government has undertaken to support his claim diplomatically, recourse to the local courts is no longer necessary, unless required by his own government.⁴

LACHES, LIMITATION AND PRESCRIPTION

§ 384. Effect of Delay in Presenting Claim.

Closely related to the failure to exhaust local remedies is the unnecessary delay in resorting to a remedy. The claimant who permits too long a time to elapse before making known his claim, loses his remedy and therefore his legal right in all systems of jurisprudence. Domat well said: "The indolence of those who are dilatory in recovering their property and claiming what is due them, should be punished, and . . . those who are indolent shall impute to themselves the punishment."⁵ This principle has been denominated as a loss of right by prescription, a term which requires explanation for the lawyer of

¹ Wharton, II, § 242, Moore's Dig. VI, § 990.

² Moore's Dig. VI, § 989. See also *U. S. v. Diekelman*, 92 U. S. 520, 524, where the Court of Claims was designated as the appropriate forum with consent of Prussian government.

³ Day, Arbitrator, in *Metzger (U. S.) v. Haiti*, Oct. 18, 1899, For. Rel., 1901, 262 and *supra*, p. 819, note 2.

⁴ Mr. Hill, Act'g Sec'y of State, to Mr. Merry, Sept. 29, 1900, For. Rel., 1900, 809, Moore's Dig. VI, 685-686.

⁵ Domat, Civil and public law (Strahan's ed., 1732), Lib. 8, t. 7, § 4.

the common law, in that acquisitive prescription, or the acquisition of right or title by long-continued and uncontested possession must be distinguished from extinctive or negative prescription, by which is meant the limitation of action or loss of a remedy.¹

The principles of public policy—based upon such practical considerations as the destruction and loss of evidence, the inability to call witnesses, etc.,—which place a bar upon the prosecution of stale and aged claims, hardly require discussion. The necessity for peace from litigation after the lapse of a certain period of time is as applicable to public law as it is to private law. "Time itself is an unwritten statute of repose," and while states, in the prosecution of international claims, are not bound by any specific statute of limitations, the principle underlying these statutes and the doctrine of laches are applied by them. We cannot do better here than to quote the able statement of Dr. Francis Wharton, formerly Solicitor of the Department of State:

"While international proceedings for redress are not bound by the letter of specific statutes of limitations, they are subject to the same presumptions, as to payment or abandonment, as those on which statutes of limitation are based. A government cannot any more rightfully press against a foreign government a stale claim which the party holding declined to press when the evidence was fresh than it can permit such claims to be the subject of perpetual litigation among its own citizens.

"It must be remembered that statutes of limitations are simply formal expressions of a great principle of peace which is at the foundation not only of our own common law, but of all other systems of civilized jurisprudence. It is good for society that there should come a period when litigation to assert alleged rights should cease; and this principle, which thus limits litigation when wrongs are old and evidence faded, is as essential to the administration of justice as is the principle that sustains litigation when wrongs are recent and evidence fresh. 'Rules for the application of such limitations,' said Mr. Justice Swayne in *Wood v. Carpenter*, 101 U. S. 139, 'are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While

¹ Holland's *Jurisprudence*, 11th ed., 1910, p. 213. See also Angell, J. K., *Limitations of actions at law and suits in equity and admiralty*, 6th ed., by John W. May, Boston, 1876, Ch. I; Hewitt, E. P., *Statutes of limitations*, London, 1893, pp. 1-3; Wood, H. G., *Limitations of actions at law and in equity*, 3rd ed., by J. M. Gould, Boston, 1901.

time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.' " ¹

§ 385. Laches.

The unreasonable delay or neglect in enforcing a claim at a proper time is in itself a ground for its rejection, quite apart from the matter of lapse of time, which merely raises certain (often conclusive) presumptions. The reason for the rule is that the delay in the presentation of the claim prevents the defendant government from adducing defenses and invoking remedies of which, had it had timely notice of the claim, it might have availed itself. Laches operates as a waiver of rights. What is unreasonable delay or neglect depends, of course, upon the particular facts and circumstances of each case. The period of delay may on occasion be very short.² The failure to present a claim either at all or in good time to a commission established for the purpose of hearing claims,³ or to enter an appeal from a municipal decision within the time allowed, provided the time and the circumstances are fair and reasonable,⁴ have been held to constitute justifications for dismissal of a claim on the ground of laches. When the time for municipal suit or appeal was too short, the claimant, if an alien, has been excused by his government for the failure to bring his action within the time allowed,⁵ and has been accorded diplomatic redress.

¹ Note in 3 Wharton, 972, § 239, Appendix.

² Davis (Gt. Brit.) *v.* Venezuela, Feb. 13, 1903, Ralston, 406 (failure for two years to notify Venezuela of the erroneous delivery of consigned goods by customs officials, *dictum*); Underhill (U. S.) *v.* Venezuela, Feb. 17, 1903, Ralston, 45, 46 (failure to bring action promptly against tort-feasor, *dictum* by Paul, Venezuelan Commissioner); Turner (U. S.) *v.* Mexico, Apr. 11, 1839, Moore's Arb. 3126.

³ Commission of July 4, 1831, between U. S. and France dismissed claims in which claimant failed to avail himself of the relief provided under the treaty of 1800. Kane's notes, p. 90. Haggerty *et al.* (U. S.) *v.* Mexico, Act of March 3, 1849, Moore's Arb. 2665 (failure to present claim to 1839 commission, a jurisdictional condition, without explaining omission). See also Accessory Transit Co. (U. S.) *v.* Costa Rica, July 2, 1860, Moore's Arb. 1563; Mr. Bayard, Sec'y of State, to Mr. Muruaga, Dec. 3, 1886, For. Rel., 1887, 1015, 1022.

⁴ The *Fame* (U. S.) *v.* Great Britain, Nov. 19, 1794, Moore's Arb. 3100 (failure to enter appeal until 18 months after time allowed).

⁵ *Supra*, p. 823.

Governments frequently establish domestic tribunals to hear claims of individuals against the state. The Southern Claims Commission was such a tribunal, and the Court of Claims and Heads of Departments, under various general and special acts, have acted and act in that capacity. In practically all cases, a statute of limitations is provided for, by which citizens and aliens are bound.¹ Foreign governments, particularly those of Latin-America have often established such domestic commissions, particularly at the end of revolutionary disturbances, and have set a definite limitation of time for the presentation of claims. If this period has seemed unreasonably short, and foreign governments have regarded the local government as internationally responsible for the injury upon which the claim of their citizen is based, these governments have not considered themselves as deprived of the right of presenting a diplomatic claim by reason of the claimant's failure through inability to appear on time before the local tribunal.² Thus, Secretary Hay in 1899, said: "Even admitting that a government may fix a limitation of time for the presentation of international claims, this would afford no justification for fixing a time unreasonably brief, and the tacit consent of a claimant government to such a measure cannot be deduced from the fact that it did not expressly object to it."³

§ 386. Limitation.

Strictly speaking, the lapse of a long time without presenting a claim raises a presumption of laches. But in view of the fact that there is no specific statute of limitations in international law, a claimant may overcome the presumption of laches arising from long delay by showing a valid excuse or justification. Thus, international com-

¹ The application of the statute of limitations under the Bowman and other Acts, and the application of the doctrine of laches by the Court of Claims and in the Departments is discussed by C. F. Carusi in an article on Government contracts, 43 Amer. L. Rev. (1909), 161, 165-169.

² Mr. Clayton, Sec'y of State, to Mr. Van Alen, July 10, 1849, Moore's Dig. VI, 1002. This position might be justified on the ground that a proper international obligation cannot be avoided by municipal statute. See Spader (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 162; Morris' Report, 326, 327. Natives, of course, are bound by the municipal statute.

³ Mr. Hay to Mr. Dudley, March 28, 1899, as printed in Moore's Dig. VI, 1003.

missions have held that a claim is not barred by prescription when there was no laches on the part of the claimant or his government in the presentation of the claim,¹ or where the reasons for invoking prescription do not exist.

The Department of State has often declined to bring to the attention of a foreign government a claim presented after such a long time that the difficulty of a proper investigation of the facts or the disappearance of evidence may reasonably be assumed. In 1885, Secretary Bayard wrote: "In view of the long delay which occurred in instituting the present proceedings, the injury having been inflicted in 1863, and the difficulty of arriving at the true state of the facts . . . the Department has considered it futile to institute proceedings."² Similarly, claims which have been allowed by claimants to rest or which have not been heard of for a great many years have been allowed to drop by the Department. Failure to avail oneself of a remedy and enforce one's right for an unreasonably long time gives color to a suspicion of fraud or bad faith, which only the clearest evidence may overcome.

§ 387. Decisions of International Tribunals.

International commissions have had frequent occasion to pass upon the effect of a failure to present a claim for a prolonged period of time. While they have not allowed municipal statutes or rules of limitation to bar an international claim³ or considered any particular length of time as constituting a period of limitation, they have, nevertheless, recognized and applied the principle of prescription so as to bar numerous claims the presentation of which was inordinately delayed. They have acted on the doctrine that the "principle of peace" from litigation which lies at the basis of all statutes of limitation is as binding on an international court in its administration of justice as the statute

¹ *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 328.

² Mr. Bayard to Mr. O'Connor, Oct. 29, 1885, Sen. Doc. 287, 57th Cong., 1st sess., 10. See also Mr. Bayard to Messrs. Morris and Fillette, July 28, 1888, Moore's Dig. VI, 1005.

³ *Pious Fund Claim (U. S.) v. Mexico*, 1902, U. S. Agents' Rep., Sen. Doc. 28, 57th Cong., 2nd sess., 17, 858, cited in Ralston's International arbitral law, § 563; *Spader (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 162; *Gentini (Italy) v. Venezuela*, Feb. 13, 1903, *ibid.* 729. For other awards relating to limitation and prescription, see Ralston, *op. cit.*, §§ 564-578 and Moore's Arb. IV, ch. I.XIX.

is on a municipal court. The reasons for the application of the rule of prescription were tersely expressed by Umpire Plumley of the British-Venezuelan commission of 1903 in the Stevenson case: ¹

"When a claim is internationally presented for the first time after a long lapse of time, there arises both a presumption and a fact. The presumption, more or less strong according to the attendant circumstances, is that there is some lack of honesty in the claim, either that there was never a basis for it or that it has been paid. The fact is that by the delay in making the claim the opposing party—in this case the government—is prevented from accumulating the evidence on its part which would oppose the claim, and on this fact arises another presumption that it could have been adduced. In such a case the delay of the claimant, if it did not establish the presumption just referred to, would work injustice and inequity in its relation to the respondent Government."

International commissions have dismissed on one or other of these grounds claims in which no complaint had been made for fifteen or sixteen years after the date of the injuries complained of,² and in other cases have barred claims unasserted or not presented for periods of twenty-three,³ twenty-six,⁴ twenty-eight,⁵ thirty-one,⁶ thirty-nine,⁷ forty-three⁸ or more⁹ years. Many of these cases, as will have been observed, came before the United States-Venezuelan commission of 1885, and two of the ablest opinions over written on the question of prescription are those by Commissioner Little in the Williams case and Commissioner Findlay in the Barberie case.

¹ Stevenson (Gt. Brit.) v. Venezuela, Feb. 13, 1903, Ralston, 327, 328 (*dictum*).

² Black and Stratton (U. S.) v. Mexico, July 4, 1868, Moore's Arb. 3138, 3139; Mossman (U. S.) v. Mexico, *ibid.* 4180, 4181 (*dictum*). See also the *Horatio* (U. S.) v. Venezuela, Dec. 5, 1885, *ibid.* 3027 (*dictum*).

³ Bettiker (U. S.) v. Venezuela, Dec. 5, 1885, Opinions, Washington, 1890, p. 92 (*dictum*, disallowed for lack of citizenship).

⁴ Williams (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 4181-4199, Opinion by Little, Commissioner.

⁵ Driggs (U. S.) v. Venezuela, Dec. 5, 1885, Opinions, 403; Forrest (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 2944, 2946.

⁶ Gentini (U. S.) v. Venezuela, Feb. 13, 1903, Ralston, 729.

⁷ Corwin (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 3210-3220 (*dictum*, disallowed on other grounds).

⁸ Spader (U. S.) v. Venezuela, Feb. 17, 1903, Ralston, 162.

⁹ Barberie (U. S.) v. Venezuela, Dec. 5, 1885, Moore's Arb. 4199-4203, Opinion by Findlay, Commissioner.

Prescription is a rule of inference and establishes a presumption. When actual facts disprove the inference and the presumption, which are founded in the highest equity—namely, the avoidance of possible injustice to the defendant¹ because of ignorance of the existence of the claim—the reason for the application of the rule ceases. In several cases, therefore, in which timely notice of the existence of the claim had been given to the defendant government, with full opportunity to examine witnesses and the evidence and to adduce contradictory proof, it was held that there was no danger of injustice to the defendant, and notwithstanding the fact that the claim had not, for one reason or another, been prosecuted for many years, the tribunals declined to apply the rule of prescription.² Similarly, where public records support the existence of the claim, the reason for the principle ceases.³ Again, where the impoverishment⁴ or the dilatoriness of the defendant government⁵ is responsible for the delay in prosecution or payment, the claim having been seasonably brought to its attention, the claim is not considered as barred by prescription.

The presentation of the claim at any time after its origin will interrupt the running of the prescriptive period, and if the circumstances themselves, particularly the absence of any presumption of waiver or abandonment, or the shortness of the time elapsed, do not operate to inflict injustice upon the defendant government, the defense of prescription will not be admitted.⁶ The existence of public records, as in the case of unpaid national bonds and claims for overcharged taxes and duties, which refutes any inference of injustice to the de-

¹ Umpire Ralston's statement in *Gentini (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 727; *Giacopini (Italy) v. Venezuela*, *ibid.* 767.

² *Gentini (Italy) v. Venezuela*, Feb. 13, 1903, Ralston, 720, 727; *Giacopini (Italy) v. Venezuela*, *ibid.* 765, 767; *Tagliaferro (Italy) v. Venezuela*, *ibid.* 764, 765; *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *ibid.* 327, 329.

³ *Dictum* in *Gentini (Italy) v. Venezuela*, *ibid.* 730; *Williams (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 4194 (*dictum*).

⁴ *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, Ralston, 329.

⁵ *Roberts (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston, 142 (30 years elapsed between presentation and adjudication; the defendant government, if the rule of prescription had been applied, would have been allowed to reap advantage from its own dilatoriness); *Stevenson (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *ibid.* 327, 329.

⁶ *Butterfield (U. S.) v. Denmark*, Dec. 6, 1888, Moore's Arb. 1185, 1205; *For. Rel.*, 1889, p. 159; *Canada (U. S.) v. Brazil*, March 14, 1870, *ibid.* 1733, 1745.

fendant government by reason of a belated demand for payment, better justifies the favorable award of the commission of 1853 between Great Britain and the United States, on claims for the refund of excess duties, than the ground upon which the decisions were apparently supported, namely, "that no statutes of limitation can be pleaded in bar of claims arising under treaties."¹

Long delay in the presentation of a claim has on occasion been held to stop the running of interest during the period of delay.²

In the *Daniel* case before the French-Venezuelan commission of 1902, it was held that the defense of prescription had to be pleaded, the commission being unable to take it into consideration of its own accord.³

In the case of the *Macedonian* against Chile, the governments took the precaution of stipulating that the question of prescription should be excluded from the consideration of the arbitrator.⁴

¹ *King and Gracie (U. S.) v. Great Britain*, Feb. 8, 1853, Moore's Arb. 4179, 4180; Similar cases (Gt. Brit.) *v. U. S. ibid.* 4180.

² *Donnell's Executor (U. S.) v. Venezuela*, Dec. 5, 1885, Moore's Arb. 3545; *Russia v. Turkey*, July 22, 1910, Award of the Hague Court of Arbitration, Nov. 11, 1912, 7 A. J. I. L. (1913), 195, 199.

³ *Piton (France) v. Venezuela*, Feb. 19, 1902, Sen. Doc. 533, 59th Cong., 1st sess., 462; also reported as *Daniel (France) v. Venezuela*, Ralston, 507, 509.

⁴ *Macedonian (U. S.) v. Chile*, Nov. 10, 1858, Moore's Arb. 1449, 1461.

CHAPTER VI

LIMITATIONS ARISING OUT OF SUBJECT-MATTER AND POLITICAL CONSIDERATIONS

§ 388. Subject-matter.

It has already been observed that claims arising out of contracts are not ordinarily pressed diplomatically, but that official assistance is confined to the use of good offices.¹

Similarly, claims arising out of injuries received during belligerent operations are usually not recoverable, under the accepted principles of international law. The nature of the transaction in which the injury is received bars the claim. The limitations upon this rule have already been amply considered.²

The decision of the Spanish Treaty Claims Commission in the case of the *Maine*³ may be said to support the principle that the officers and seamen of a public vessel have no individual claims against a foreign government guilty of a national injury upon the vessel on which they serve, the individual claim being merged, and indeed lost, in the national claim. In view of the fact, however, that the United States has on various occasions successfully prosecuted claims against foreign governments arising out of injuries committed, in time of peace, upon the officers or seamen of a public vessel, the ground of decision in the *Maine* case seems unsatisfactory. It may with far greater reason be supported upon the ground set forth by Commissioner Maury in his concurring opinion, namely, that the war between the United States and Spain and the treaty of peace put an end to and extinguished all grievances and causes of difference connected with its origin.⁴

¹ *Supra*, § 113, and exceptions to the rule noted in same chapter.

² *Supra*, § 98, *et seq.*

³ *McCann v. U. S.*, Final Rep. of Commission, May 2, 1910, p. 11.

⁴ *Supra*, p. 362. Opinion of the Commission, March 6, 1902, concurring opinion of

There has been much difference of opinion upon the effect of war upon the claims of the citizens of one of the belligerents upon the government of the other. The answer to the question as to whether such claims are extinguished by the war or survive it depends upon the relation of the claims to the causes of the war. Thus, the treaty of Ghent between the United States and Great Britain has been held to have extinguished the previous claims against Great Britain arising out of spoliations on American commerce under the orders in council during the Napoleonic Wars, the treaty having made no mention of compensation. By the preponderating weight of authority, claims based upon transactions disconnected with the causes of war survive the war and the treaty of peace, even if not specifically mentioned in the treaty.¹

In earlier chapters of this Part, it has been observed that claims founded upon transactions against public policy, or which shock the moral sense, or which are unneutral in character, are barred from consideration by the claimant government.²

Claims involving the determination of title to real estate are always left to the *lex rei sitæ*, and are not made a ground of diplomatic interposition except in cases of denial of justice, after a vain exhaustion of local remedies.³ Such matters include questions relating to succession and other methods of acquiring title. Similarly, it is not within the scope of the duties of a diplomatic officer to assist American citizens in the conduct of their private law suits unless discrimination or a denial of justice is practiced against them.⁴

§ 389. Political Considerations.

Political considerations operate in many instances to prevent or limit the prosecution of claims against foreign governments. For Commissioner Maury, p. 4. See criticism of decision in 38 American L. Rev. (1904), 790-792, from Legal Observer.

¹ See the extracts printed in Moore's Dig. VI, § 1053. *White (U. S.) v. Mexico*, Act of March 3, 1849, Opin. 287 (not in Moore).

² See, e. g., Moore's Dig. VI, § 974.

³ Moore's Dig. VI, § 993; Mr. Hale, Ass't Sec'y of State, to Mr. Kulussowski, May 8, 1872, Moore's Dig. VI, 324.

⁴ Mr. Rives, Ass't Sec'y of State, to Mr. Coakley, April 11, 1888, Moore's Dig. VI, 325.

example, the obligations imposed by the necessity to maintain friendly relations with foreign states may often serve to prevent the institution of a claim which is apt to disturb amicable relations. The unsettled condition of a foreign government often makes it inopportune to press pecuniary claims, because of the improbability of payment, and because of the tendency to embarrass the foreign government and disturb international amity.¹ In like manner, the impoverishment of the defendant government has been regarded as an obstacle, by reason of futility, to the presentation of a claim.² Again, the relations of the claimant and defendant country in the matter of reciprocal claims may be such that the presentation of a claim would be futile, *e. g.*, if the claimant state has declined to consider pecuniary claims instituted against it by the defendant state, as is the case, *e. g.*, in the refusal of the United States to entertain the East Florida interest claims of Spain.³ Strained relations from any cause would naturally constitute a bar to the prosecution of pecuniary claims. The political inexpediency of presenting a claim, a matter entirely within the discretion of the claimant government, is, therefore, a most potent factor in limiting diplomatic protection, and may, under present conditions, serve to bar many a well-founded and just claim.

The respect due to the independence and territorial jurisdiction of states is the reason for the limitations which claimant states impose upon themselves in requiring their citizens to resort to their local remedies, in not demanding, in the case of states normally well organized, any more effective guaranties for the protection of aliens than are accorded to citizens, and in invoking the local administrative machinery and all amicable methods for the redress of grievances before resorting to more vigorous measures to exact reparation.

¹ Mr. Seward, Sec'y of State, to Mr. Otterbourg, August 8, 1867, Dipl. Cor., 1867, II, 445.

² Mr. Bayard, Sec'y of State, to Mr. O'Connor, Oct. 29, 1885, Sen. Doc., 287, 57th Cong., 1st sess., p. 10.

³ Moore's Arb. 4519-4531.

CHAPTER VII

LIMITATIONS ARISING OUT OF MUNICIPAL LEGISLATION OF THE DEFENDANT STATE

§ 390. Originating Conditions.

It would hardly be proper to leave the discussion of limitations upon diplomatic protection without some consideration of the various attempts of some of the weaker states of the world, where diplomatic interposition is most frequent, to avoid, by legislative enactment, the exercise of coercive measures by foreign nations in behalf of their nationals. The exploited countries of the world, particularly some of the states of Latin-America, furnish the conditions for the institution of large numbers of foreign claims, namely, the presence of a great many foreigners, large investments of foreign capital, and weak judicial and administrative organization. The exploiting countries, often taking advantage of their superior power, have compelled these weaker countries to pay innumerable foreign claims, not always founded upon strict justice; and notwithstanding a constant improvement in political organization and the comparative rarity of revolutionary disturbances, diplomatic claims have not ceased to be pressed. Many of the exploiting countries have apparently been unwilling to entrust the rights of their nationals unreservedly to the administrative and judicial machinery of the exploited states. This condition has naturally led some of the weaker states, particularly in Latin-America, to invoke various rights and principles,—their rights of equality, independence, and territorial jurisdiction, the principle of equality between national and alien, the rule that the alien must accept the local law as he finds it, and the necessity of exhausting local remedies and establishing a technical denial of justice as conditions precedent to a well-founded international claim—in the effort to relieve themselves of the onerous and unjust pressure of foreign claims. It is not with-

out a considerable degree of truth that the governments and publicists of various states of Latin-America allege that the European powers too readily accede to the demands of their nationals for diplomatic interposition, however exaggerated and doubtful their claims may be; that in answer to their contention that the foreigner should submit his claim to the local courts, the European powers send a threat, often followed by a warship; that confronted with this show of force legal rights are cast to the winds and that the heel of the oppressor, in the form of diplomatic intervention for the exaction of payment of doubtful claims, saps their vitality and stunts their growth and development into healthy members of the international family, which position international law legally assigns to them.

The attitude of the exploiting countries in the matter embodies the view that the political organization of many Latin-American countries is so weak, that judges depend so thoroughly upon executive favor, that, in the light of their experience, they must conclude that their citizens cannot secure from the courts that impartiality to which they are entitled, and that they cannot leave the rights of their citizens unreservedly to the determination of the local courts. Even where the South American states have succeeded by treaty and diplomacy in securing a recognition of the principle that claims of foreigners can only be diplomatically pressed where, after an exhaustion of local remedies, there has been a denial of justice, the exploiting countries undertake to judge for themselves what they will consider a denial of justice, so that the principle, while in conformity with the international law applied among the European states themselves, is, in its application to Latin-America, extremely flexible. A judgment, they say, may in spite of the observance of forms be nevertheless prejudicial to the interests of their citizens and they reserve the right to determine whether in each particular case justice has been in any degree denied.

In view of these conditions, the Latin-American states, relying upon the doctrines of Calvo and other publicists—that pecuniary claims against the state must be submitted to local courts, and only in the event of a denial of justice become the subject of diplomatic interposition—and upon the principles of international law, equally

supported by publicists and the practice of European nations among themselves—namely, the right of a sovereign state to independence, to complete territorial jurisdiction, to establish the conditions under which foreigners may enter and reside in the country—have in their constitutions, laws, and treaties embodied certain principles whose object has been to restrict the diplomatic interposition of foreign countries to its narrowest limits and thus relieve themselves of one of their most onerous burdens.

These principles and provisions of law may be considered in connection with the different categories of claims, the pressure of which they have sought to prevent or overcome: first, claims arising out of injuries to person and property suffered in civil wars, inflicted both by state authorities and revolutionists; secondly, claims based upon acts of violence and oppression of various kinds, such as false arrest, imprisonment and expulsion; and, finally, claims arising out of contracts concluded with aliens. The question of public debts and the Drago doctrine have been considered in our discussion of contractual claims in general.

§ 391. Legislative Limitations upon Diplomatic Protection. Civil War Injuries.

First, then, as to civil war injuries. The responsibility of the state for such injuries has already been considered (*supra*, § 93). The Latin-American states assert that an injury received by an alien in civil war constitutes no better ground of claim than an injury received in an international war. They assert that states do not recognize in such cases any right to indemnity in favor of their own citizens and that aliens cannot enjoy any such privilege, in view of the fact that when they enter a state they submit themselves to the local law. Calvo, whose doctrine that pecuniary claims cannot ordinarily justify diplomatic interposition we have already to some extent discussed, states his principles in the matter of claims arising out of injuries received in civil war in the following terms:¹

1. "The principle of indemnity and diplomatic intervention in behalf

¹ Calvo, *Le droit international*, §§ 1280–1297, the principle being stated in v. III, § 1297, pp. 155–156.

of foreigners for injuries suffered in cases of civil war has not been admitted by any nation of Europe or America."

2. "The governments of powerful nations which exercise or impose this pretended right against states relatively weak, commit an abuse of power and force which nothing can justify and which is as contrary to their own legislation as to international practice and political expediency."¹

The frequent occasions upon which Latin-American states have been compelled to pay indemnities to foreigners for such injuries² has induced a number of them to include clauses in their constitutions, laws, treaties, and conventions of Pan-American Congresses, exempting themselves from all obligation to indemnify aliens for injuries sustained during civil war, not only when these are caused by insurgents,³ but also when the injury is caused by the authorities in the suppression of the uprising or revolution. The clause usually reads:

"Neither [citizens] nor foreigners shall have in any case the power to claim from the government indemnification for damages arising out of injuries done to their persons or property by revolutionists."

The last word of this clause, "revolutionists," has been extended in meaning to cover insurrectionists or turbulent bodies of men, who

¹ In support of these principles, he cites Rutherforth, de Martens, Miraflores, Torres Caicedo, and Vattel; see to the same effect, Pradier-Fodéré, *Traité de droit international public*, §§ 204-205, 1224.

Calvo extends the principle as well to case of injuries sustained during mob violence (Vol. 3, § 1271, pp. 133-134; Vol. 6, § 256, p. 231).

It may be added that under the term "civil war," the Latin-American states include political commotions, insurrections and tumults having in view a change in administration or political organization by force of arms.

² After the civil war in Chile in 1891, 1 R. G. D. I. P. (1894), 164 and 171; 3 *ibid.* (1896), 478; 4 *ibid.* (1897), 416-418; at the end of the civil war in Venezuela in 1892, 2 R. G. D. I. P. (1895), 344; at the end of the civil war of 1893-4 in Brazil, 4 R. G. D. I. P. (1897), 403 *et seq.*; Seijas, *El derecho internacional*, V, 544-551; and on other occasions, 2 R. G. D. I. P. (1895), 338 and *supra*, p. 243.

³ Constitution of Guatemala, Art. 14, Rodriguez, *American Constitutions*, I, 238; Salvador, Art. 46, Rodriguez, I, 268; Venezuela, Arts. 14 and 15, Rodriguez, I, 201, and in arts. 20 and 21 of the Constitution of Aug. 4, 1909; Haiti, Art. 185, Rodrigueuz, I, 85; Honduras, Art. 142, Rodriguez, I, 388; Honduras decree of Feb. 24, 1868, 61 St. Pap. 529. Ecuador, law of August 25, 1892, Art. 12, 84 State Papers, 645; Venezuela, law of April 16, 1903, Art. 17, 96 State Papers, 647; Peru, decree of October 12, 1868, *Diplomatic Correspondence* (For. Rel.), 1868, Pt. 2, p. 887; Salvador, decree of April 13, 1908, For. Rel., 1908, 706. Legislative limitations are cited by J. Goebel, Jr., in his article in 8 A. J. I. L. (1914), 833 *et seq.*

in the name of revolution may rob the store of a foreigner, tear up a railroad built and owned by a foreigner, or do other violent damage. There is no reservation or qualification in the clause, even in case of negligence by the authorities in failing to prevent or suppress the uprising. In the case of such a clause included in an earlier constitution of Guatemala, the representatives of the United States, Great Britain, France, Germany, Spain and Italy gave notice of their determination to protect their fellow-citizens in person and property to the extent authorized by the law of nations, irrespective of the local enactments of the laws of Guatemala.¹

The convention on the rights of aliens adopted at the Second Pan-American Conference at Mexico in 1901, to which the United States did not subscribe, reads:

"The states are not responsible for damages sustained by aliens through acts of rebels or individuals and in general for damages originating from fortuitous causes of any kind, considering as such the acts of war whether civil or national, except in the case of failure on the part of the constituted authorities to comply with their duties." ²

The treaties that have been concluded between European and American states providing for exemption from responsibility in cases of civil war do not extend the exemption to cases where state authorities have been negligent.³

¹ Mr. Logan to Mr. Evart, January 17, 1881, For. Rel., 1881, p. 98.

² Second International Conference of American States, Sen. Doc. 330, 57th Cong., 1st sess., p. 228.

³ Alvarez, *Le droit international americain*, Paris, 1910, p. 122, and the following treaties:

Germany and Mexico, Dec. 5, 1882, Art. 18, Martens' *Recueil des traités*, Vol. 59, p. 474.

Sweden and Norway and Mexico, July 29, 1885, Art. 21, *ibid.*, Vol. 63, p. 690.

France and Mexico, Nov. 27, 1886, Art. 11, *ibid.*, Vol. 65, p. 843.

Italy and Mexico, April 16, 1889, Art. 12, April 16, 1890, Art. 12, *ibid.*, Vol. 68, pp. 711 and 771.

Belgium and Mexico, June 7, 1895, Art. 15, *ibid.*, Vol. 73, p. 73.

Germany and Colombia, July 23, 1892, Art. 20, *ibid.*, Vol. 69, p. 842.

Italy and Colombia, Oct. 27, 1892, Art. 21, *ibid.*, Vol. 72, p. 313.

Spain and Peru, July 16, 1897, Art. 4, Olivart's *Colección de tratados de España*, Vol. 12, p. 348; 4 R. G. D. I. P. (1897), 795.

Spain and Honduras, Nov. 17, 1894, Art. 4, Olivart, *op. cit.*, Vol. 11, p. 156.

Spain and Colombia, April 28, 1894, Art. 4, Olivart, *op. cit.*, Vol. 11, p. 63.

The Institute of International Law deprecates the practice of concluding treaties in which states hold themselves irresponsible for injuries inflicted during civil war insurrections or riots. The resolution passed at the session of 1900 reads as follows:

"The Institute of International Law recommends that states should refrain from inserting in treaties clauses of reciprocal irresponsibility. It thinks that such clauses are wrong in excusing states from the performance of their duty to protect their nationals abroad and their duty to protect foreigners within their own territory. It thinks that states which by reason of extraordinary circumstances do not feel able to assure in a manner sufficiently efficacious the protection of foreigners on their territory can escape the consequences of such a state of things only by temporarily denying to foreigners access to their territory."¹

European nations in supporting claims of their citizens arising out of civil wars and insurrections, regardless of whether insurgents or authorities caused the injury, take the ground that the responsibility of the state is due to a lack of diligence in preventing or suppressing uprisings. This ground, it is believed, could hardly be general, for "the highest interests of the state are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility towards a foreign state."² Moreover, if they were negligent in fact, it would be extremely difficult to prove, and if the claims rested upon this basis alone few of them could be prosecuted to payment. As a matter of fact, the ground is advanced for plausibility only, and assuming that the states are so organized that civil commotion is only a fortuitous event and not one invited by lack of proper political and police organization, we must support the Latin-American states in their endeavors to be relieved from the diplomatic pressure of claims resulting from injuries sustained in the operations incident to civil war.

¹ *Annuaire*, 1900, pp. 254-256.

² Hall, *International law*, 5th ed., 1904, p. 223. See also, Fiore, *Nouveau droit international public*, Antoine's translation, § 673 *et seq.*; Pillet, *Les lois de la guerre*, p. 29; Wiese, *Le droit international appliqué aux guerres civiles*, § 14; Leval, *La protection diplomatique*, § 103; Pittard, *Protection des nationaux*, 1896, pp. 281-282.

§ 392. Legislative Limitations to Avoid Claims Based upon Tortious Injuries.

The second, and perhaps the largest, class of claims to forestall which various Latin-American states have enacted legislation limiting the diplomatic protection of foreigners, are those arising out of acts of violence or oppression in times of nominal peace. The limitation consists in denying the lawfulness of diplomatic interposition in these cases, except where there is a denial of justice. In enacting such legislation, these states of Latin-America base themselves squarely upon the Calvo doctrine, namely, that every claim advanced by a foreigner, whether against an individual or against the state, must find its final settlement before the local courts, and only in the event of a denial of justice can diplomatic interposition be entertained. The law of Venezuela, typical of many of these provisions, reads as follows (law of April 16, 1903, Art. 11):

“Neither domiciled aliens nor those in transit have the right to have recourse to diplomatic intervention except when legal means having been exhausted before the competent authorities, it is clear that there has been a denial of justice, or a notorious injustice has been done or that there has been an evident violation of the principles of international law.”¹

Article 3 of the Convention adopted by the Second Pan-American Conference² on the rights of aliens provides:

“Wherever an alien shall have claims or complaints either civil, criminal or administrative, whether against a state or its citizens, he

¹ 96 State Papers, 647, and 8 R. D. I. privé (1912), p. 9; Venezuela, Executive Decree of Nov. 13, 1912, 8 A. J. I. L. (1914), Suppl. 174-175 and criticism by A. de Busschère on the ground of its liberality in 3 Rev. de derecho y leg. (Caracas), Oct. 1913, pp. 3-6; see also Costa Rica, law of December 20, 1886, Moore's Dig. VI, pp. 269-270; Salvador, law of September 27, 1886, Art. 39, Moore's Dig. VI, 267, For. Rel., 1887, p. 69; Salvador, Legislative decree of May 10/30, 1910, arts. 4 and 18, Libro rosado; Ecuador, law of August 26, 1892, Art. 10, 84 State Papers, 645; Mexico, law of May 28, 1886, Art. 35, Legislación mexicana, Vol. 17, p. 474 *et seq.*, For. Rel., 1895, II, 1012; Guatemala, Constitution, Art. 23, Rodriguez, I, 239; Nicaragua, Constitution, Art. 11, Rodriguez, I, 362; Peru, law of April 17, 1846, Pradier-Fodéré, *op. cit.*, III, 234; Honduras, Constitution, Art. 14, Alvarez, *op. cit.*, 120; Bolivia, decree of May, 1871, For. Rel., 1871, p. 39.

² Sen. Doc. 330, 57th Cong., 1st sess., p. 228.

shall present his claims to a competent court of the country and such claims shall not be made through diplomatic channels except in the cases where there shall have been on the part of the court a manifest denial of justice or unusual delay, or evident violation of the principles of international law."

This convention, which expresses the Latin-American contention, has been incorporated into their constitutions and statutes and has found expression in a number of treaties concluded between European and American states.¹ Mexico seems to have had little difficulty in negotiating such treaties. In 1890, the United States declined to conclude a treaty with Ecuador containing such a clause, not because the United States did not recognize the principle, but because difficulty was felt in introducing into "our conventional relations with a single state stipulations which, although not novel in design, are yet so in form, and which might for that reason be open to misconstruction."²

In some treaties the exemption from diplomatic interposition, except in cases of manifest denial of justice, has specific reference only to the case of aliens taking part in civil struggles and provides that these shall be treated as nationals without recourse to diplomatic interposition except in cases of denial of justice.³ As will be noted, these aliens are frequently considered as nationals by local legisla-

¹ Germany and Mexico, Dec. 5, 1882, Art. 18, Martens' *Recueil des traités*, Vol. 59, p. 474; Sweden and Norway and Mexico, July 29, 1885, Art. 21, *ibid.*, Vol. 63, p. 690; France and Mexico, Nov. 27, 1886, Art. 11, *ibid.*, Vol. 65, p. 843; Holland and Mexico, Sept. 22, 1897, Art. 16, *ibid.*, Vol. 83, p. 188; Germany and Colombia, July 23, 1892, Art. 20, *ibid.*, Vol. 69, p. 842; Italy and Colombia, Oct. 27, 1892, Art. 21, *ibid.*, Vol. 72, p. 313; Spain and Peru, July 16, 1897, Art. 6, Olivart's *Colección de tratados de España*, Vol. 12, p. 348, 4 R. G. D. I. P. (1897), 795; Spain and Colombia, April 28, 1894, Art. 6, Olivart, *op. cit.*, Vol. 11, p. 63; France and Venezuela, Nov. 26, 1885, Art. 5, Martens' *Recueil*, Vol. 62, p. 684; United States and Peru, Sept. 6, 1870, Art. 37, Martens' *op. cit.*, Vol. 51, p. 107; Pradier-Fodéré, *op. cit.*, III, 236; For. Rel., 1883, p. 913; Great Britain and Bolivia, August 1, 1911, art. 10, Treaty Series, 1912, 223. See also Tchernoff, *La protection des nationaux*, pp. 295-296.

² Mr. Blaine, Secretary of State, to Mr. Caamano, May 19, 1890, Moore's Dig. VI, 270.

³ Spain and Ecuador, May 23, 1888, Art. 3, Olivart's *Colección de tratados de España*, Vol. 9, p. 27; Spain and Honduras, Nov. 17, 1894, Art. 3, Olivart, *op. cit.*, Vol. 11, p. 156; Belgium and Ecuador, March 5, 1887, Art. 3, Martens' *Recueil*, Vol. 65, p. 741; Italy and Colombia, Oct 27, 1892, Art. 5, *ibid.*, Vol. 72, p. 310.

tion, and most countries limit diplomatic interposition in their case to gross violations of the laws of war as applied against them.

§ 393. Subtle Legislative Measures to Avoid Interposition.

Besides these frank attempts to restrict diplomatic interposition, much ingenuity has been shown by various states of Latin-America in devising more subtle measures to bring about the desired results. The first method is to provide that "foreigners are entitled to enjoy all the civil rights enjoyed by natives," and that "a nation has not, nor does it recognize in favor of foreigners, any other obligations or responsibilities than those established by [its] constitution and laws in favor of [its] citizens." These provisions are a direct result of the resolutions of the Pan-American Conferences of 1889 and 1901, which were subscribed by almost all the states represented except the United States. Articles 1 and 2 of the convention on the rights of aliens adopted at the Second Pan-American Conference at Mexico, 1901-1902, have been reincorporated into the constitutions and laws of the majority of the Latin-American republics. This convention provides:

(1) "Aliens shall enjoy all civil rights pertaining to citizens and may make use thereof in the substance, form or procedure and in the recourses which result therefrom, under exactly the same terms as the said citizens, except as may be otherwise provided by the constitutions of each country."

The reservation embodied in the words "except as may be otherwise provided by the constitution of each country" leaves the effect of the convention in some doubt.

Article 2 provides:

"The states do not owe to, nor recognize in favor of foreigners any obligations or responsibilities other than those established by their constitutions and laws in favor of their citizens."¹

¹ Sen. Doc. 330, 57th Cong., 1st sess., p. 228. One American writer, Edgington, in considering the effect of placing foreigners on an equality with citizens, states rather sarcastically that this gives the foreigner the inestimable privilege of being robbed on the same lamentable terms as the citizen. See also Alvarez, *op. cit.*, 234-235; Calvo, *op. cit.*, VI, § 256, p. 331; For. Rel., 1893, pp. 731-734.

The Third Pan-American Conference at Rio de Janeiro, 1906, did not renew the convention on the rights of aliens adopted at the Mexican Conference in 1901, but

Mr. Trescott, the delegate of the United States at the Conference of 1889, foresaw that such a provision was an attempt to forestall diplomatic intervention by "an internal legislative limitation of liability," a proposition which the United States government has never admitted as having force in determining the responsibility of states to one another.¹ This attempted limitation is, of course, merely supplementary to a general provision in every state system in Latin-America that foreigners must submit themselves for all purposes to the local law.²

The United States has never receded from its position that a citizen's right to ask the protection of his government does not depend upon the local law, but upon the law of his own country, and that the limits of diplomatic protection are fixed by international law without possibility of restriction by municipal legislation.³

seems to have left the matter to be governed by the principles of international law. Alvarez, *op. cit.*, 235.

The following constitutions, among others, embody this provision:

Colombia, Art. 11, Rodriguez, II, 321; Costa Rica, Art. 12, Rodriguez, I, 328; Ecuador, Art. 37, Rodriguez, II, 283; Honduras, Art. 11, Rodriguez, I, 362; Nicaragua, Arts. 7-8, Rodriguez, I, 301; Panama, Art. 9, Rodriguez, I, 394; Paraguay, Art. 33, Rodriguez, II, 388.

The following laws contain a similar provision:

Guatemala, Law of Feb. 21, 1894, Art. 47, 86 State Papers, 1281 *et seq.*; Mexico, Law of May 28, 1886, Art. 30, For. Rel., 1895, II, 1012; Legislación mexicana, Vol. 17, p. 474 *et seq.*; Venezuela, decree of Nov. 13, 1912, 8 A. J. I. L. (1914), Suppl. 174-175.

¹ Report on the Uniform Code of International Law at the First International American Conference, Sen. Ex. Doc., 51st Cong., 1st sess., pp. 28, 29; Mr. Fish, Secretary of State, to Mr. Foster, Minister to Mexico, July 15, 1875, Moore's Dig. VI, 310. See Mr. Bayard's statement with reference to the Venezuelan law of February 14, 1873, Moore's Dig. VI, 745; see also For. Rel., 1887, p. 99; 1888, p. 491; 1893, pp. 731-732.

² Salvador, Constitution, Art. 45, Rodriguez, I, 268; Cuba, Constitution, Art. 10, Rodriguez, II, 115; Salvador, law of September 29, 1886, Art. 38, 77 State Papers, 116; Colombia, law of November 28, 1888, Art. 9, 79 State Papers, 167 *et seq.*

³ Mr. Bayard to Mr. Hall, Feb. 16, 1887, For. Rel., 1887, p. 99; Mr. Bayard to Mr. King, Oct. 13, 1886, For. Rel., 1887, p. 246; Mr. Partridge to Mr. Gresham, For. Rel., 1893, p. 731; Mr. Frelinghuysen to Mr. Soteldo, April 4, 1884, For. Rel., 1884, p. 599, Moore's Dig. VI, 321; Mr. Olney, Sec'y of State, to Mr. Dupuy de Lôme, Feb. 17, 1896 and Mr. Rockhill, Act'g Sec'y of State, to same, July 25, 1896, For. Rel., 1896, pp. 677 and 680; Miliani (Italy) *v.* Venezuela, Feb. 13, May 7, 1903, Ralston, 756. See the series of quotations and extracts collected by Plumley, Umpire, in Aroa

Some states have in one portion of their laws governing foreigners,¹ provided that the alien has the right "to appeal to the protection of his country by diplomatic means according to the precepts established by the constitution." This apparently liberal provision is subsequently modified in the same law by a clause that such diplomatic intervention is only possible in cases of denial of justice after the ordinary means provided by the laws have been exhausted, and then follows a special legislative definition of the term "denial of justice" in which it is provided that a "denial of justice" is understood when the "judicial authority refuses to make a formal declaration concerning the main issue or any of the incidents in the case," and that a "denial of justice" cannot be alleged no matter how iniquitous or contrary to law the decision may be. In the law of Honduras of April 10, 1895,² the clause reads:

"Aliens may not have recourse to diplomatic intervention except in case of denial of justice, and after having in vain appealed to the ordinary means provided by the laws of the Republic." (Art. 34.)

"Denial of justice is understood when the judicial authority refuses to make a formal declaration concerning the principal matter or any of the incidents of the case. . . . Consequently, by the mere act of the judge giving a decision or sentence in any sense, denial of justice cannot be asserted, although it may be said that the decision is iniquitous or contrary to law." (Art. 35).

In other words, if a decision has been made in the case, "denial of justice" can no longer be alleged. When read together with the provision of obedience to local laws, the constitutional prohibition against making a treaty which would under any circumstances guarantee the right of aliens to appeal to their governments for protection, the provision that the alien has no other recourses than those which the law gives to the citizen, and, finally, the legislative definition of a "denial of justice" which makes a decision apparently just no matter

Mines (Gt. Brit.) *v.* Venezuela, Ralston, 378, 380. The German government takes a similar position, Ralston, Appendix, p. 969, *Asuntos internacionales*.

¹ Honduras, decree of April 10, 1895, Art. 27, 87 State Papers, 703-704; Salvador, law of September 29, 1886, Art. 29, 77 State Papers, 116-118; Guatemala, decree of February 21, 1894, Art. 42, 86 State Papers, 1281 *et seq.*

² 87 State Papers, 705-706. See also Salvador, law of September 29, 1886, Arts. 39 and 40, 77 State Papers, 116-118, *For. Rel.*, 1887, p. 69; Guatemala, decree of February 21, 1894, Art. 42, 86 State Papers, 1281 *et seq.*

how iniquitous it may be, it would seem that such a legislative limitation completely defeats the ends of justice.

Secretary Bayard, in commenting on these provisions of the law of Salvador, stated that the denial to the foreigner of the right to appeal to his government necessarily implies the denial in the particular case of his government's right to intervene, and as this denial is based upon the decision of a tribunal of Salvador, the judgments of this tribunal are made internationally binding as to all questions of municipal or of international law coming before them. He added that while "it may be admitted as a general rule of international law that a denial of justice is proper ground of diplomatic intervention, this is merely the statement of a principle and leaves the question in each case whether there has been such denial to be determined by the application of the rules of international law."¹

It is hardly to be supposed that any foreign state, even among those which have concluded treaties with Latin-American republics providing for a renunciation of diplomatic interposition in all cases except denial of justice, would consider itself bound by a municipal legislative interpretation of the term "denial of justice." Great Britain and the United States, with rare exceptions,² have not only declined to conclude treaties renouncing diplomatic interposition, but have expressly protested against any articles of local law which purport to limit or restrict the diplomatic interposition of the government.³

¹ Mr. Bayard, Secretary of State, to Mr. Hall, November 29, 1886, For. Rel., 1887, pp. 80-81.

² Treaty between United States and Peru, September 6, 1870, Art. 37, Pradier-Fodéré, *op. cit.*, III, 236; Martens' Recueil, Vol. 51, p. 107. See also treaty between Great Britain and Bolivia, Aug. 1, 1911, art. 10, Treaty series, 1912, 223.

³ Great Britain and the United States, while upholding the duty of their injured citizen abroad to appeal to the local courts for redress, have never hesitated to interpose in his behalf when they deemed a foreign court in any way unworthy of confidence. Lord Palmerston in the House of Commons, June 25, 1850; Akerman, Attorney-General, 1871, 13 Op. Atty. Gen. 547, cited in Moore's Dig. VI, 681-682.

In some cases of oppression resort to the judicial remedy may be dispensed with, diplomatic interposition being immediate. *Supra*, p. 819.

For attitude of Germany, see For. Rel., 1902, p. 844, Moore's Dig. VI, 300.

For United States protest, see For. Rel., 1887, pp. 78, 99, Moore's Dig. VI, 267, 270, and for Great Britain's protest, December 7, 1887 and April 17, 1888, against the law of Salvador of Sept. 29, 1886, see 77 State Papers, 116.

Another general provision by which it is sought to limit state responsibility stipulates that the public official causing the injury shall be personally sued and the state cannot be made a party to the suit. The provision in the constitution of Haiti reads as follows:

"The injured parties, however, shall have the right if they choose to prosecute before the courts according to law the individuals recognized as authors of the wrongs perpetrated and seek in this way the proper legal reparation."¹

How limited the redress of the individual under such circumstances must be is apparent on its face.

Perhaps the most drastic attempt to limit diplomatic interposition was incorporated into the decree of Ecuador of July 17, 1888,² in which the nation was relieved from responsibility to aliens for all damages resulting from war, civil or international, from all military operations or measures adopted for the restoration of public order, and from "measures adopted by the government towards natives or foreigners involving their arrest, banishment, or imprisonment . . . whenever the exigencies of public order . . . require such action." In this case a collective note was addressed by the diplomatic body at Quito to the Minister of Foreign Affairs in which they stated that they would act on the principle that the internal legislation of a state cannot alter international law to the prejudice of the subjects of other nations.³ The United States in a series of notes declared that they could "never acquiesce in any attempt on the part of [Ecuador] to use such a statute as an answer to a claim which this government had presented."⁴

Some states have sought to avoid diplomatic interposition by es-

¹ Constitution of Haiti, October 9, 1889, Art. 185, Rodriguez, II, 85. See also Ecuador, constitution, Art. 39, Rodriguez, II, 284; Salvador, constitution, Art. 38, Rodriguez, I, 294; Bolivia, constitution, Art. III, Rodriguez, II, 441-442; Venezuela, decree of February 14, 1873, Art. 3. See also Tchernoff, *Protection des nationaux*, 1899, p. 292; Calvo, *op. cit.*, § 1263. The Venezuelan decree of Nov. 13, 1912 grants a right to sue the officer and a more limited right to sue the state. 8 A. J. I. L. (1914), Suppl. 174. The legislative decree of Salvador, May 10, 1910, art. 1, limits the responsibility of the state for the acts of its officers.

² *Recopilación de leyes de Ecuador* (Noboa), Vol. 2, pp. 124-125; 79 *State Papers*, 166.

³ 79 *State Papers*, 166-167; Alvarez, *op. cit.*, 121.

⁴ *For. Rel.*, 1881, pt. 1, pp. 490-492.

establishing a court or board of commissioners which was to have jurisdiction of claims against the state presented both by subjects and by foreigners. The harsh conditions which have at times accompanied the presentation of a claim to such a board might easily involve more danger and loss to the individual bringing the claim than if he had never made it known. Thus, the Venezuelan decree of February 14, 1873 (republished January 24, 1901), provides (Arts. 1 and 2) that persons preferring claims against the nation, whether natives or foreigners, on account of damages, injuries or seizures, by national or state officers, either in civil or international war, or in time of peace, shall make a formal application to the high federal court. In the trial of such cases the admission of oral testimony is forbidden unless the officer who caused the damage or made the seizure refuses to give written evidence, or unless it is impossible to obtain such evidence. . . . It is further provided (Art. 8) that any claimant who shall manifestly appear to have exaggerated the amount of the damages claimed shall forfeit any right that he may have, and shall be liable to a fine of from 500 to 3,000 venezolanos, or to imprisonment for from three to twelve months, and that if the claim shall appear to be wholly fraudulent, the guilty party shall be liable to a fine of from 1,000 to 5,000 venezolanos, or to imprisonment from six to twenty-four months. The decree also provides (Art. 9) that "in no case can it be claimed that the nation or the states are bound to grant indemnity for damages, injuries, or seizures that have not been executed by legally competent authorities, acting in their public capacity."¹ The Venezuelan law of April 16, 1903, compels the alien to subscribe a declaration binding himself to abide by the provisions of the decree of 1873, under penalty of expulsion.² Secretary of State Frelinghuysen, in the correspondence

¹ Venezuela, decree of February 14, 1873, *Recopilación de leyes*, Vol. 5, 1870-73, pp. 241-243, 74 State Papers, 1065-67; Moore's Dig. VI, 318-319; *Aroa Mines (Gt. Brit.) v. Venezuela*, February 13, 1903, *Ralston*, 350 *et seq.* Art. 15 of the Constitution of 1903, renewed by Art. 21 of the Constitution of 1909 denies any rightful claim of indemnity from the government if the officers acted in their official capacity. Between the law of 1873 and the Constitution, the margin of state liability would seem to be exceedingly narrow. The effect of the decree of Nov. 13, 1912 is hardly to enlarge state responsibility.

² 96 State Papers, 647 *et seq.* See also 2 R. G. D. I. P. (1895), 344 *et seq.*, and article by Daguin, "Les étrangers au Venezuela," 1 R. D. I. privé (1905), 277 *et seq.*

which took place with the Venezuelan Minister as to the application of this decree to a certain claim, stated:

"A foreigner's right to ask and receive the protection of his government does not depend upon the local law, but upon the law of his own country. His citizenship goes with him into whatever country he may visit, and the duty of his government to protect him so long as he does nothing to forfeit his citizenship accompanies him everywhere. This duty his government must discharge, and it could not, if it would, be relieved therefrom by the fact that the municipal law of the country where its citizen may happen to be has seen fit to provide under what circumstances he may be permitted to appear before the authorities of that country. Such a law cannot control the action or duty of his government, for governments are bound among themselves only by treaties or by the recognized law of nations, and there is nothing in the existing treaties between the two countries or in the law of nations which recognizes as pertaining to Venezuela the right by the enactment of a municipal law to say how, or where, or under what circumstances the government of the United States may or may not ask justice in behalf of one of its own citizens."¹

Seijas, the noted publicist, and for a long time Minister of Foreign Affairs of Venezuela, explains this law as due to the desperation into which Venezuela had been driven by the large number of exaggerated foreign claims which had been successfully pressed against her because Venezuela was too weak to resist the armed forces of European powers. It is to be feared that the enactment of such harsh laws are more of a detriment than a help to these countries in securing the desired relief.

The Latin-American countries have occasionally, however, established courts of claims to consider claims arising out of injuries inflicted upon foreigners, which are apparently free from these hazardous limitations.² Even these attempts to assume final jurisdiction

¹ Mr. Frelinghuysen, Sec'y of State, to Mr. Soteldo, Venezuelan Min., Apr. 4, 1884, For. Rel., 1884, p. 599, Moore's Dig. VI, 321.

² Thus, Colombia, by a law of August 31 and October 11, 1886, 77 State Papers, 810, as amended February 15, 1887, 78 State Papers, 53, provided that loans, supplies, expropriations or other losses even when under circumstances caused by rebels shall be compensated for. See decree of Colombia, July 30, 1878, 69 State Papers, 376; Guatemala, law of February 21, 1894, Art. 81, 86 State Papers, 1281 *et seq.*; Colombia, law of October 17, 1903, 98 State Papers, 839.

As in most systems derived from Roman law, the state generally, in Latin-

over and satisfy the claims of foreigners arising out of injuries received, have not been acceded to in all cases. Thus, Secretary of State Bayard, referring to the Colombian law of 1886, establishing a board of claims to consider the claims of foreigners arising out of the recent rebellion, stated:

"It is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subjects; and you are consequently to take the ground in all discussions with the Government of Colombia that the statute adopted by Colombia on the 31st of August, 1886, is regarded by the government of the United States as in no way whatever qualifying or limiting the obligations of Colombia to the United States for injuries inflicted on citizens of the United States when in Colombia."¹

It is sometimes provided that the bringing of a claim which would prejudice the nation or any recourse to diplomatic protection involves the expulsion of the foreigner.²

Other attempts to secure jurisdiction over the foreigner take the form of ascribing local citizenship to him or depriving him of foreign nationality on the performance of or omission to perform certain acts. This might be considered an easy form of naturalization, but whereas citizenship is usually regarded as a benefit, it must in these cases be considered a penalty, inasmuch as it forfeits the foreigner's rights

America, can be sued. It is expressly provided for in the following constitutions and laws:

Argentina, constitution, Art. 100, Rodriguez, I, 127-128; Brazil, constitution, Art. 60, *ibid.* I, 155; Colombia, constitution, Art. 151, *ibid.* II, 355; Costa Rica, constitution, Art. 46, *ibid.* I, 332; Venezuela, constitution, Art. 14, *ibid.* I, 225; Brazil, law of November 20, 1894, *Collecção das leis*, 1894, I, 16 *et seq.*; Colombia, law of August 31, 1886, Arts. 1, 2, 77 State Papers, 807; Venezuela, law of April 16, 1903, Art. 16, 96 State Papers, 647 *et seq.*; Executive decree of Nov. 13, 1912, 8 A. J. I. L. (1914), Suppl. 174; Guatemala, law of February 21, 1894, Art. 81, 86 State Papers, 1286 *et seq.*

The Supreme Court is usually given jurisdiction of suits in which the government is a party.

¹ Mr. Bayard, Secretary of State, to Mr. King, October 13, 1886, For. Rel., 1887, p. 246.

² Nicaragua, constitution, Art. 11, Rodriguez, I, 302; Honduras, constitution, Art. 15, *ibid.* I, 362; Honduras, law of April 10, 1895, Art. 37, 87 State Papers, 707; Alvarez, *op. cit.*, 120.

as a foreign citizen and subjects him to all the conditions to which the native citizen must submit. Thus, Brazil provided, in 1889, that all aliens who within a certain period failed to register their foreign nationality before certain administrative boards would lose their right of alienage.¹ Similarly, the laws of certain states provide that foreigners who enter the public service and accept a salary, thereby become citizens.²

It is generally provided that foreigners who take part in the domestic struggles of the country remain subject, as are citizens, to the consequences of their conduct in conformity with the local law.³ A participation in the political affairs of the country of residence is sometimes penalized with serious consequences for the foreigner, at least according to municipal legislation. The law of Venezuela of April 11 (16), 1903, makes it clear that alienage is regarded as a substantial benefit to the individual, and that means are sought to bring the rights of the alien down to the precarious level of those of the citizen. Art. 6 of the law of 1903 provides:

"Foreigners domiciled or in transit must not mix in the political affairs of the Republic nor in anything relating to said political affairs. To this end they cannot:

"1. Form a part of political societies.

"2. Edit political newspapers or write about the interior or exterior policies of the country in any newspaper.

"3. Fill public office or employment.

¹ Brazil, constitution, Art. 69, reincorporating the decree of December 14, 1889, Rodriguez, I, 158; see also on forced naturalization, Moore's Dig. III, § 378, and *supra*, pp. 535, 683, 712.

² Salvador, constitution, Art. 48, Rodriguez, I, 268; Ecuador, law of 1888, Art. 5, First Pan-American Conference, Report on Uniform Code of International Law, Sen. Ex. Doc. 183, 51st Cong., 1st sess., p. 28, and U. S. protest thereon. See also *supra*, pp. 712, 813.

³ Venezuela, decree of May 18, 1869, 59 State Papers, 1304; Constitution of 1904, art. 14. The American republics generally reserve the right of treating aliens who take part in their civil struggles as their own nationals. See treaties of Germany and Colombia, July 23, 1892, Art. 20, Martens, Vol. 69, p. 842; Spain and Honduras, November 17, 1894, Art. 3, Olivart's Colección, Vol. II, p. 156; Spain and Colombia, April 28, 1894, Art. 4, Olivart, *ibid.*, Vol. II, p. 63; Italy and Colombia, October 27, 1892, Art. 5, Martens, Vol. 72, p. 310. See also debate in German Reichstag, January 21, 1894, cited in R. G. D. I. P. (1895), 343-344. In the treaties concluded among themselves, the Latin-American countries usually incorporate a provision to this effect. Tchernoff, *op. cit.*, 210.

"4. Take arms in the domestic contentions of the Republic.

"5. Deliver speeches which in any way relate to the politics of the country."

Article 7 provides:

"Domiciled foreigners who violate any of the provisions established in article 6 lose their character of foreigners and become *ipso facto* subjected to the responsibilities, burdens, and obligations which might be occasioned to natives through intestine political contingency."¹

Foreign corporations doing business in the state are sometimes regarded as national corporations,² especially where they are the grantees of a concession-contract from the government. Turkey, by a law of January 10, 1888, endeavored to attach to its permission to foreigners to set up printing presses the obligation of renouncing the immunities and privileges of foreigners, and a subjection to the same law as Turkish nationals. The United States adhered to its policy of refusing to consider its right of protection impaired in any way by such a municipal law.³

The holding of real property sometimes has as its consequence local citizenship, or, at least, with respect to such property, the obligations of citizenship. Thus, the law of Haiti containing this provision was advanced as a defense to a claim for the injury of property in Haiti owned by an American citizen. The arbitrators in the case decided that the provision could only be given effect where there had been a legal proceeding to dispossess the American citizen under the law, and in the absence of such proceeding, mere possession was considered to entitle him to an indemnity for injuries to his property.⁴ The provision in the constitution of Mexico of 1857, by which aliens holding

¹ Senate Doc. 413, 60th Cong., 1st sess., p. 16.

² Colombia, constitution, Art. 14, Rodriguez, II, 321; Venezuela, constitution, art. 124, Rodriguez, I, 231; Salvador, law of September 29, 1886, Art. 5, 77 State Papers, 116.

The statutes often provide that concession contracts made with foreigners or foreign corporations shall make the concessionary a citizen for all purposes of the contract. See also, North and South American Construction Co. (U. S.) v. Chile, Aug. 7, 1892, Moore's Arb. 2318-2322.

³ Mr. Bayard, Sec'y of State, to Mr. Strauss, Minister to Turkey, June 28, 1888, For. Rel., 1888, II, 1599.

⁴ Williams (U. S.) v. Haiti, Convention of 1885, Moore's Arb. 1859. See For. Rel., 1885, 525, 540.

real estate became Mexican citizens unless they manifested an intention to retain their foreign citizenship, came for consideration before the Commission of July 4, 1868, in which Umpires Lieber and Thornton both held that even though there was no manifestation of an intent to retain their original citizenship, nevertheless, Mexican citizenship could not be imposed upon foreigners by the law, as the provision was permissive and not obligatory; likewise, that it had no retroactive effect upon an alien acquiring real estate prior to the enactment of the constitutional provision.¹

§ 394. Matriculation as Foreigner.

Several countries, such as Mexico, Salvador, Spain (in Cuba), Honduras, Guatemala, Venezuela and Peru,² have at various times by their municipal law required foreigners to matriculate or register their alienage in a certain book kept for that purpose, as a condition precedent to the assertion of their rights as foreigners. As provided for by the Salvadorean law of September 29, 1886, Arts. 21-28, these rights of foreigners are:

(1) To appeal to the treaties and conventions existing between Salvador and their respective governments.

(2) To have recourse to the protection of their sovereign through the medium of diplomatic representation.

(3) The benefit of reciprocity.

¹ Anderson and Thompson (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 2482; Morton (U. S.) *v.* Mexico, July 4, 1868, Moore's Arb. 2477-2479. See also *supra*, p. 492.

² Mexico, decree of March 16, 1861, *Legislación mexicana*, Vol. 9, p. 123; decree of December 6, 1866, *ibid.*, Vol. 9, p. 749; decree of July 28, 1871, *ibid.*, Vol. 11, p. 540; decree of April 6, 1872, *ibid.*, Vol. 12, p. 173. These decrees were repealed by the law of May 28, 1886, *ibid.*, Vol. 17, p. 474, by which optional registration was substituted for compulsory matriculation. See Moore's Dig. VI, pp. 309-314, and authorities there cited.

Salvador, law of September 29, 1886, Arts. 21-28, 77 State Papers, 116-122, Moore's Dig. VI, 314-315, III, 791-793; Spain in Cuba, decree of October 3, 1895, *Revista de Legislación*, Boletín, v. 100 (1895), pp. 639-640, Moore's Dig. VI, 316-317, III, 794-795; Honduras, decree of April 16, 1895, Arts. 23-26, 87 State Papers, 703-704; Ley de extranjería, Feb. 8, 1906, Art. 25, For. Rel., 1909, pp. 361-363; Guatemala, decree of February 21, 1894, Arts. 35-41, 86 State Papers, 1281 *et seq.*; Venezuela, law of April 16, 1903, Art. 12, 96 State Papers, 647 *et seq.*; Peru, decree of March 3, 1887, Moore's Dig. IV, 26.

The Cuban regulations of 1895 and the Mexican law of 1861 similarly made matriculation a condition precedent to the assertion of rights as foreigners, either as granted by municipal law or by treaty. The omission so to matriculate, therefore, would operate as an estoppel or deprivation of their rights as citizens of a foreign country. Mexico even required in its law of 1861 (Art. 8) that "tribunals and judges, before entering any claims presented before them by a foreigner, must first demand a presentation of said certificate, noting its date and number, and without such presentation no such claimant shall be heard in court or out of it." These countries contend that such matriculation is a proof of the alien's nationality and of his right to the special privileges and obligations embodied in the rights of aliens. According to the Salvadorean statute, unless a foreigner possesses a certificate of matriculation no authority or public functionary of Salvador is permitted to concede to him any of these rights.

With respect to these statutes, the United States has taken the view that while this government is disposed to admit the convenience of registration as an additional evidence of the rights of its citizens to the protection of the local authorities, and by consular instructions has facilitated such registration, it has never consented that the failure to register could deprive American citizens of their rights as such citizens.¹ Mr. Bayard's interpretation of the Salvadorean statute was that "by making the compliance of a foreigner with a municipal regulation a condition precedent to the recognition of his national character, the [foreign] government not only assumes to be the sole judge of his status, but imposes upon him as a penalty of non-compliance a virtual loss of citizenship." He considered this to be an attempt to abrogate the sovereign right of this government toward its citizens in foreign lands, "to which this government has never given assent."

¹ Mr. Olney, Sec'y of State, to the President, December 7, 1896, For. Rel., 1896, p. lxxxvii and p. 677 *et seq.* (with reference to the Cuban statute); Mr. Fish, Sec'y of State, to Mr. Foster, Minister to Mexico, July 15, 1875, Moore's Dig. VI, 310 (with reference to the Mexican statute); Mr. Bayard, Sec'y of State, to Mr. Hall, November 29, 1886, For. Rel., 1887, pp. 78-80 (with reference to the Salvadorean statute).

See also Moore's Dig. VI, 315; *ibid.* III, 790 *et seq.*

According to a letter from Mr. Hall (For. Rel., 1887, p. 111) Salvador, evidently heeding the objection of foreign governments, took no steps to carry out the law.

France has likewise protested¹ against any limitation, by these requirements of local legislation, of its right to protect its citizen.

The result is, that while foreign governments will admit that their subjects abroad must comply with reasonable local requirements as to registration, the omission to register or matriculate cannot vitiate the alien's right to diplomatic protection by his own government.

§ 395. Legislative Limitations in Matters of Contractual Claims.

The third class of claims, those arising out of contracts between aliens and the government, have given rise to a form of legislative limitation, according to which, as a term of the concession-contract itself, the alien renounces his right to call upon his own government for diplomatic protection. The provision is incorporated in the constitutions or laws of several countries, and makes it incumbent upon the government in granting a concession to include in the contract a clause to the effect that the foreigner "renounces all right to prefer a diplomatic claim in regard to rights and obligations derived from the contract"; or else that "all doubts and disputes" arising under it "shall be submitted to the local courts without right to claim [the] diplomatic interposition" of the alien's government.²

It has already been observed in the discussion of the contractual renunciation of protection, that this form of limitation traces its origin to the doctrines of Calvo. It has been noted that foreign offices and international tribunals have for the most part declined to consider the alien's government bound by this form of contractual renunciation of diplomatic protection.

§ 396. Conclusions.

The fundamental Latin-American theory which has been responsible for the enactment of these legislative provisions, which to the

¹ 17 Clunet (1890), pp. 766-767.

² Ecuador, constitution, Art. 38, Rodriguez, II, 283, 4 R. G. D. I. P. (1897), 228. See also Ecuador, law of August 25, 1892, Art. 14, 84 State Papers, 646; Venezuela, constitution, Art. 124, Rodriguez, I, 230; Colombia, law of November 26, 1888, Art. 15, 79 State Papers, 167 *et seq.*, and Arts. 42 and 43 of the fiscal code adopted Dec. 2, 1912, Comp. Law Bull., 1914, p. 99. See also Colombian immigration law of 1908, Arts. 5 and 6, requiring immigrants to waive diplomatic protection. For. Rel., 1909, 221.

European lawyer seem at least useless as an amelioration of existing conditions, if not actually subversive of international law, is expressed in article 125 of the Venezuelan constitution of 1904:

"International law is *supplementary* to national legislation; but it can never be invoked against the provisions of this constitution and the individual rights which it guarantees."

In other words, whereas Europe and the United States regard international law in international matters as superior to and impossible of modification by municipal law,¹ the states of Latin-America maintain the supremacy of their own laws in international matters. Therefore, they assert that while international law may *aid*, it can never dictate, control or determine any matter which is in conflict with its own statute law and the national interpretation thereof.

What conclusion may be drawn from these attempts of the Latin-American Republics to relieve themselves from the pressure of foreign claims. When we observe the gross exaggeration of claims before international commissions and the small proportion of awards made, it will readily be agreed that the Latin-American republics have some justification for complaint that foreign claims are pressed upon them unjustly.² The principles they have adopted in their municipal legis-

¹ *Heathfield v. Chilton*, 4 Burr. 2016; *Holland*, *Studies in international law*, Oxford, 1898, p. 195 *et seq.*, and cases there cited; *Plumley, Umpire, in Aroa Mines (Gt. Brit.) v. Venezuela*, Feb. 13, 1903, *Ralston*, 376 *et seq.*

² The civil war claims of Great Britain against the United States, settled by a Mixed Commission under the Convention of 1871, amounted to about \$96,000,000; less than \$2,000,000, or about two per cent, was actually awarded to British claimants (*Moore's Arb.* 692-693.)

The claims of France, growing out of the civil war, were settled under the convention of Jan. 15, 1880, and aggregated \$35,000,000; the awards amounted to about \$625,000, less than two per cent of the amount demanded. (*Moore's Arb.* 1133 *et seq.*, 1156.)

The claims of the citizens of the United States *v. Mexico*, under the convention of July 4, 1868, amounted to \$470,000,000; about \$4,000,000 was the sum awarded, or less than one per cent. The claims of the citizens of Mexico *v. the United States* amounted to \$86,000,000; about \$150,000 was awarded, or about one-fifth of one per cent. (*Moore's Arb.* 1319 *et seq.*)

The Mixed Commissions which sat at Caracas, Venezuela, in 1903, awarded to citizens of the United States about 2,300,000 bolivars, as against about 81,400,000 demanded; 1,975,000 to Spanish claimants, as against 5,300,000 demanded; 174,000 to Swedish and Norwegian claimants as against 1,048,000 demanded; 544,000 to

lation to forestall diplomatic interposition are such as the exploiting nations, for the larger part the countries of Europe, admit, by common international practice, in their relations among themselves. By declining to admit their application to the Latin-American republics, these countries in effect deny that the states of Latin-America have reached that stage in the administration of civilized justice which would warrant a complete and final surrender of the rights of their subjects to the determination of the local courts.¹

Experience has shown that to a limited extent the European nations are correct in their assumption. The frequency of uprisings and revolution, due to the instability of political organization and lack of popular confidence in authority, tended, in some of the smaller countries, to bring about a subserviency of the judicial branch to the executive authority in power at the moment. This condition, however, is rapidly disappearing, and in some of the more progressive countries of Latin-

Netherlands' claimants as against 5,243,000 demanded; 2,577,000 to Mexican claimants as against 2,898,000 demanded; 2,976,000 to Italian claimants, as against 39,844,000 demanded; 2,092,000 to German claimants, as against 7,376,000 demanded; 9,400,000 to British claimants, as against 14,743,000 demanded; 10,898,000 to Belgian claimants, as against 14,920,000 demanded. The Venezuelan commissions acted under protocols peculiarly harsh to Venezuela, for example, by recognizing in advance, in certain protocols, state liability for acts of unsuccessful revolutionists. Latané, "The forcible collection of international debts," in the *Atlantic Monthly*, October, 1906, p. 546; French claimants were awarded \$685,000, as against nearly \$8,000,000 demanded. (*The Outlook*, 1906, Vol. 82, p. 104.) To the Spanish Treaty Claims Commission claims aggregating \$64,931,694 were presented, of which \$1,387,845 were allowed. (Final Rep., May 2, 1910, pp. 19-20.) Most of the figures presented above are taken from an article by Amos S. Hershey in 1 A. J. I. L. (1907), p. 44, and from a paper by Prof. John H. Latané in the *Proceedings of the American Society of International Law*, 1907, p. 137.

¹ See instruction of Secretary of State Gresham, to Mr. Ryan, Minister to Mexico, April 26, 1893, cited in Moore's Dig. VI, 270-271, to the effect that only "where complete international equality is recognized," must a country "admit the competency and the disposition of the courts of the other to do complete justice to all litigants . . . regardless of nationality."

See also opinion of M. Thiers cited in the Project presented to the Pan-American Conference of 1901 at Mexico by a delegation of several Latin-American states, session of December 4, 1901. Second International American Conference, English text, Mexico, Government Printing Office, 1902, Vol. 2, pp. 273-274. See also Moore's Dig. VI, 267.

America, such as Argentine and Chile, such conditions are entirely a matter of history. Moreover, it is unfair to these exploited countries to place foreigners who invest their capital, their time, and their energy in exploiting the natural resources of these countries, in such a favored position that their presence becomes a continual potential menace. These individuals often, in a considerable degree, escape all obligations to their own country, and by their favored position as foreigners, escape most of the obligations of the citizens of the country in which they reside. Their investments are always made with the hope of enormous profits, which are often realized. When these individuals so closely identify themselves with the life of their country of residence, as, for instance, by marrying, engaging in business, and permanently residing there, they might very properly be compelled to bear the obligations of citizenship. They might then have more interest in improving economic and social conditions and political organization. Certainly they should be required to do more than simply register their intention of retaining their original citizenship, in order to derive the vast benefits which accrue from the possession of foreign nationality. It is not difficult to understand the desperation to which Latin-American states have been driven in the attempt to overcome this great obstacle to their progress.

As the European countries, however, have the necessary war-ships to enforce demands, just and unjust, and have no intention, apparently, of changing their attitude, the weaker Latin-American countries, who alone have resorted to legislative limitations, have gained very little, if anything, by the enactment of legislative provisions limiting the diplomatic protection of foreigners. They have, indeed, by the enactment of such drastic laws, suffered greater prejudice, in the way of lost confidence, than would have resulted from the complete abandonment of their rights to the recognized principles of international law and the submission of their case to the public opinion of the world.

Just as contractual claims must now, by the Porter proposition, be first submitted to arbitration before the use of force is permissible, so all claims should be submitted to international arbitration until that time comes when all the Latin-American republics, in fact as well as in law, shall have raised their standard of judicial organization

to a plane at which even the European countries will recognize and admit the ability of their courts to perform their full international duty as measured by the standards of international law. When they shall be able to impress this fact on the world, measures will be established by international, and not by municipal law, which will relieve the Latin-American states from the unwarranted diplomatic pressure of foreign claims. Until the administration of justice in these states, therefore, itself induces that confidence which will relieve them from burdensome diplomatic claims, foreign governments will, it is feared, no more than heretofore, consider themselves hampered by the provisions of local legislation.

GENERAL CONCLUSIONS

The discussion of the present practice of adjusting international claims may warrant a brief exposition of the defects of the existing system and an indication of a possible line of progress.

In discussing the responsibility of the state in the case of claims arising out of contracts, reference was made to the desirability of submitting such eminently legal claims to the determination of an international court, and removing them from the uncertain channels of diplomacy. This resort to an international forum might be immediate, or follow a preliminary attempt and failure to arrive at a diplomatic adjustment. A considerable advance has already been made by many nations in agreeing to submit to arbitration all claims not involving their independence or national honor. By the Pan-American treaty on pecuniary claims of January 30, 1902, practically all the republics on this continent committed themselves to the obligatory adjudication of pecuniary claims which failed of adjustment by diplomatic negotiation. Moreover, the Central-American Court of Justice and the unratified international prize court convention at The Hague, have adopted the principle that nations can be sued before an international forum at the instance of an aggrieved individual. These evidences of progress give some tangible ground to hope that in the not too distant future all pecuniary claims may be submitted to a permanently established international court, an innovation which would foster individual and national justice and constitute a marked advance toward world peace.

A brief account of the defects of the existing system of instituting and collecting international claims will show the desirability of an improvement in procedure.

The claimant, under present conditions, presents his claim to the Foreign Office of his own government and requests diplomatic interposition. It may be assumed that he has exhausted his local remedies

abroad. It has already been observed that if the claim is one arising out of contract, the espousal of his claim depends largely upon the policy of his government in supporting contractual claims, so that in effect the claimant's remedy in these cases depends primarily upon his nationality—an unjust distinction and discrimination in a case purely legal. Again, the Foreign Office may grant or refuse diplomatic action, as it deems advisable, and it has been judicially determined in the United States, Great Britain and France—and the rule is probably the same in other countries—that the Minister for Foreign Affairs or Secretary of State cannot be compelled by the courts to institute or prosecute a diplomatic claim.¹ The claimant's remedy, therefore, depends entirely upon the willingness of his government, in its unimpeachable discretion, to espouse his claim. Again, the Foreign Office may approve his claim, and yet the interests of the nation or its relations with the defendant government may be such that for political reasons it is deemed inexpedient to press the claim. The archives of Foreign Offices are filled with claims which have accumulated for years, awaiting some happy event which may open the diplomatic channels for their admission to arbitral or other adjustment. The unfortunate and uncertain position of claimants under present conditions is readily apparent.

The defendant government, now often too weak to resist the demands of a strong claimant power supporting a claim intrinsically unjust, would profit greatly by the establishment of an international forum for the adjudication of pecuniary claims. While the Porter proposition,² in the matter of contractual claims, is intended to postpone the use of armed force until an offer of arbitration has been refused, there are many and oppressive measures of diplomatic coercion not so violent, but nevertheless as burdensome and annoying, and in result

¹ There is much to be said for the desirability of securing governmental approval of a citizen's claim as a condition precedent to judicial action. The necessity for such approval may be preserved, or else, as an offset, the individual claimant suing a foreign government before an international court may be compelled to deposit a sufficiently heavy security for costs and good faith as to subject himself to heavy pecuniary penalties if his claim is considered grossly exorbitant or founded in bad faith.

² *Supra*, § 122.

as effective, as armed force. Although defendant governments usually insist upon the finality of the decisions of their municipal courts, a demand which, in practice, is not unqualifiedly recognized by foreign governments, they would find their condition vastly improved by the submission of claims to the jurisdiction of an international court.

The claimant government and its Foreign Office would also be greatly relieved by the institution of a permanent court for the adjudication of pecuniary claims. These claims are now first passed upon by the law officers of the Foreign Office, who must act on *ex parte* evidence and who have not at their disposal the judicial machinery necessary to sift uncertain facts and doubtful evidence. Their determination as to the espousal or rejection of the claim is not based upon satisfactory data, and their responsibility in setting the diplomatic machinery in operation is not inconsiderable. To make international action, often of vast financial, and at times political, importance, depend upon an administrative decision based upon *ex parte* evidence, alone invites injustice to one or other of the interested parties.

Finally, the fact that the prosecution of pecuniary claims depends so largely upon political considerations, and the fact that the accumulation of unsatisfied claims always embodies the germ of international misunderstanding and controversy, present unassailable grounds for compelling the just, speedy and peaceful solution of the rights of the parties.

The existing conditions give reason to express the hope that international pecuniary claims arising out of injuries to citizens may gradually be removed from the arena of international controversy, with its dangers to the amicable relations of states, and be submitted to an international forum for judicial determination. Such a forward step in the development of international relations would assure the claimant of a fair judicial hearing (which is not now the case), and the determination of his rights and his remedy would not depend upon his nationality or upon the strength, policy, or willingness of his government to entertain the claim, but upon the merits of his case. The defendant government would be relieved from the diplomatic pressure of unjust claims which by its very weakness it now feels itself often unable to resist. The Foreign Office of the claimant government

would be immeasurably relieved by not having to present claims on *ex parte* evidence and enter into diplomatic correspondence which often disturbs friendly relations. The peace of the world would be advanced by removing from the field of conflict what is now always a germ of international difficulty. The divorce of pecuniary claims from political considerations, a union which now not only results in inexact justice, but often gross injustice, and the submission of such claims to the determination of an independent international tribunal, must make a universal appeal to man's sentiment for justice.

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INDEX

A

	PAGE
Abandoned or Captured Property Act.....	264
Abandonment of claims.....	366 <i>et seq.</i> , 373, 378
Ability to prevent injury.....	215
Ability to afford local protection.....	221, 231
Absence of nationality.....	19, 591
"Absolute equity" clause.....	803
Abuse of rights of weak states.....	331, 346, 447, 836, 839, 857, 859
Acceptance of civil office.....	777, 813
Acceptance of political office.....	687, 712, 813
Access to courts.....	291, 334, 337

ACT OF MARCH 2, 1907:

§ 1.....	501, 569, 691
§ 2.....	554, 678, 680, 702
§ 3.....	592, 602, 604, 680
§ 4.....	596, 600, 605
§ 5.....	581, 611
§ 6.....	586, 609
Act of state.....	147, 174
Acte réglementaire.....	127

ACTS OF ADMINISTRATION:

See ADMINISTRATIVE ACTS.

ACTS OF AUTHORITY:

France.....	134
Germany.....	143

ACTS OF GESTION:

France.....	8, 135 <i>et seq.</i>
Germany.....	137
Italy.....	149
Acts of government.....	132
Criteria.....	132
France.....	134
Germany.....	142
Italy.....	149
Acts of police (France).....	134 <i>et seq.</i>
Acts of war.....	256, 257

ADMINISTRATION, ACTS OF:

See ADMINISTRATIVE ACTS.

	PAGE
Administration of decedents' estates, consular	89, 404
Administrative acts	131
Administrative control	132, 138
Anglo-American system	156
Austria-Hungary	150
Belgium and other countries	154
Comparison of systems	155
Criteria	132
Different classes	134
French system	134 <i>et seq.</i>
German system	142 <i>et seq.</i>
International responsibility	185
Italy	148
Judicial control	118, 131
Roumania	154
Spain	147
Switzerland	152
Administrative authorities	183
Contracts	184
Minor officials	189
Torts	185
Administrative law	117 <i>et seq.</i>
Bibliography	119
Administrative machinery of state	213, 220

ADMINISTRATIVE SYSTEMS:

Anglo-American	156 <i>et seq.</i>
Austria	150
Belgium and other countries	153
Comparative discussion	173
Comparison of continental systems	155
France	134 <i>et seq.</i>
Germany	142 <i>et seq.</i>
Hungary	151
Italy	148
Roumania	154
Spain	147
Switzerland	152

ADMINISTRATORS:

See EXECUTORS AND ADMINISTRATORS.

Admission of aliens	44 <i>et seq.</i>
Conditions fixed by state	47
Not an enforceable right of alien	46
Aeronauts	587

	PAGE
Affidavits	655
Agencies of protection	435

AGENCY:

Relation between officer and state	186
Agents of the state	180
Aid and comfort	237, 786
Acts which do not constitute	790
Definition	786
Alabama award	387, 397, 414

ALIENAGE:

Advantages in Latin-America	93, 838, 842 <i>et seq.</i>
---------------------------------------	-----------------------------

ALIENS:

Absence of political remedy justification for diplomatic protection	106
Admission	44 <i>et seq.</i>
Bibliography	Appendix
Calvo clause	792
Civil rights	40, 42, 69 <i>et seq.</i>
Civil war injuries	838
Classes exempt from territorial jurisdiction	94
Criminal proceedings	96 <i>et seq.</i> , 333 <i>et seq.</i>
Disabilities (feudal period)	34
Discharge of municipal functions	69, 92
Domiciled aliens	91 <i>et seq.</i> , 691, 842
↳ Duties of states imposed by international law	178, 346
Enemies	111, 251
↳ Equal protection	40, 85, 104
↳ Equality of treatment with citizens	vi, 39, 40, 44, 88, 104, 350, 844
Exclusion	44 <i>et seq.</i>
Exemptions by reason of alienage	43, 93
Expulsion	48 <i>et seq.</i>
Extraterritoriality	102
History	3, 33
In municipal law	36, 71
In United States	107
In war	109, 250
Industrial and economic disabilities	79 <i>et seq.</i> , 86, 91
Industrial and literary property	89
Latin-American principles	842 <i>et seq.</i>
Matriculation	74, 723, 854
Legal personality, recognition of	40
Method of presenting claims to U. S.	355
Military service	64 <i>et seq.</i> , 93

See also MILITARY SERVICE.

ALIENS—Continued

	PAGE
Minimum of rights due aliens	39, 350
Neutral aliens in war	251
No legal right to diplomatic protection	vi, 29, 356
Ownership of real property	86, 699, 853
Pan-American conventions	844
Participating in an insurrection	237, 245, 768, 852
Partners of American citizens	613 <i>et seq.</i>
Personal property	88
Political disabilities	43, 63, 93
Political rights	63, 93
Private law	44
Private rights	86 <i>et seq.</i>
Privileged position in Latin-America	93, 350, 838, 842 <i>et seq.</i>
Public law	43
Public rights	42, 73 <i>et seq.</i> (See main head.)
Registration	
<i>See</i> MATRICULATION.	
Remedies in municipal courts	116 <i>et seq.</i> , 822
Anglo-American system	156 <i>et seq.</i>
In Austria-Hungary	150
Belgium and other countries	153
In Court of Claims	165
In France	134
In Germany	142
In Italy	149
In Spain	147
In Switzerland	152
In United States	156 <i>et seq.</i>
Resident in belligerent territory	251, 750
Restrictions upon territorial legislator	37, 39, 350
Right of residence and travel	37, 42, 74
Right of sojourn	37, 74
Roman law	4
Sources of law of aliens	38
"Special protection"	40
Subjection to territorial law	92, 94, 349, 733, 793, 795
Succession	87
Taxation	95
"Temporary allegiance"	11, 94, 349, 691
Transient aliens	91, 350, 691
Treaty rights	38, 40
Treaty rights (of aliens in U. S.)	107, 201, 226
Types of municipal legislative systems	71

ALLEGIANCE:

Paramount	698
---------------------	-----

ALLEGIANCE—*Continued*

	PAGE
Perpetual	544, 675, 677
"Temporary"	11, 94, 349, 691
True, tests to determine	697

AMNESTY:

To private offenders	218, 239
To rebels	238
Angary	113, 253, 255, 267
Annexing states	203
Annulment of contracts by government, arbitrary	292, 336
Apportionment of debts	202
Appropriation of private property	169, 184, 188, 194
In war	262

ARBITRAL COMMISSIONS, COURTS:

See TRIBUNALS OF ARBITRATION.

ARBITRARY ACTS:

In contract claims	285, 292, 295, 336
------------------------------	--------------------

ARBITRATION:

As a method of protection	442
Adjustment of claims	443, 859, 861
Bond claims	322
Contractual claims	296
Expenses	397
Jurisdiction	444
Nature of	444

ARBITRATORS:

Powers	444
Arbuthnot and Ambrister case	782

ARREST:

In war	259
On shipboard in foreign ports	408

ARREST AND DETENTION FOR:

Military service	365
Arrest, unjust or unlawful	98, 337
Assignability of claims	636 <i>et seq.</i>
Assignees	636
In bankruptcy	641
Same citizenship as assignor necessary	637
Special provisions of federal statutes	638,

ASSIGNMENT:	PAGE
Does not nationalize claims.....	637, 660
Assignment of national bonds.....	324
Association and assembly, right of.....	76
Assumption of debts on partition of states.....	202
Asylum.....	48, 435, 464
Attacks.....	257

ATTORNEYS:	
Fees.....	393
Must file power of attorney.....	656, 658
Authorities of the state.....	180 <i>et seq</i>
Courts.....	195
De facto governments.....	205 <i>et seq.</i>
Different classes.....	180
Diplomatic and military officers.....	187
Executive and administrative.....	183
Heads of the state.....	183
In contractual relations.....	183
Judicial authorities.....	195
Minor officials.....	189
Municipalities.....	200
Naval officers.....	187
Political subdivisions of state.....	199
Soldiers.....	193
Sovereigns.....	183
Tortious acts.....	185

AWARDS:	
Erroneous.....	386
Finality of.....	382
<i>See also</i> INDEMNITY.	

B

BACKWARD COUNTRIES:	
Acts of individuals.....	215
Extent of protection.....	406
Mob violence.....	221, 222
Bancroft treaties.....	548
Banishment.....	710
Bankrupt countries.....	326

BANKRUPTCY:	
Assignees in.....	64
Battle.....	256
Belligerent domicile.....	110, 253, 559 <i>et seq.</i>
Laurent and Uhde cases.....	562,

BELLIGERENT DOMICIL—*Continued*

	PAGE
Of partner.	559, 615
Withdrawal from.	560, 812
Belligerent rights.	246
Exercised after treaty of peace.	249
When they begin.	248
When they end.	249
Beneficial owners (of claims)	281, 388, 392, 642
Creditors.	643
Insurers.	646 <i>et seq.</i>
Mortgagees.	645
Birth certificates.	488, 497, 509
Blockade.	112, 234, 271, 274
As reprisal.	454
Pacific blockade.	454
Running of, effect on protection.	739
Blockades, paper.	181, 234

BOMBARDMENT:

As punitive operation.	450
As reprisal.	454
In war.	256, 259
Unauthorized.	188

BONDS, PUBLIC:

Act of sovereignty.	304, 306, 308
As distinguished from ordinary contracts.	283, 302
Bad faith in non-payment.	308, 312
Before arbitral tribunals.	323
Creation of the debt.	304, 308
Diplomatic interposition.	310 <i>et seq.</i>
Diversion of security.	316
Drago doctrine.	308, 312, 317, 321
Instructions to delegates of U. S. at Conferences.	318
International remedies.	308
Intervention.	310 <i>et seq.</i>
Law governing.	303
Liquidated debts.	316
Means of enforcement.	304 <i>et seq.</i> , 308
Nature of.	302, 306
Operation of loan contracts.	325 <i>et seq.</i> , 327
Opinions of publicists concerning official interposition.	310
Policy of Great Britain.	314
Policy of the United States.	316
Porter proposition.	318 <i>et seq.</i> , 328
Practice of nations in matter of intervention.	313
Relation between Porter proposition and Drago doctrine.	321

BONDS, PUBLIC—Continued	PAGE
Remedies in municipal courts	306
Speculative loans not enforced	315, 317
Suability of state	305
U. S. and Central-American loans	325 <i>et seq.</i>
Bondholders in foreign railroads	645
Booty	260
Bowman act	659, 715, 828
Boxer claims	424
Brigandage	219

BURDEN OF PROOF:	
Civil war injuries	232
Contraband	273
Mob violence	221

C

Cable cutting	265
Calvo clause	294, 320, 792
Decisions of international tribunals	800
Executive views	797 <i>et seq.</i>
Incorporation in concession contracts	794 <i>et seq.</i>
Ineffectiveness in preventing interposition	797, 808 <i>et seq.</i>
Validity of, denied	805
Validity of, upheld	801
Calvo doctrine	792 <i>et seq.</i> , 837, 842
Cannon and Groce cases	237, 245, 768, 783
Capitulations	431 <i>et seq.</i> , 468
Attempted abrogation by Turkey	431

CAPTURES:	
After date of treaty of peace	249, 250
Captures in neutral waters	276

CARGO:	
When protected by flag of vessel	483, 771
Carranza government	211

CENSURABLE CONDUCT:	
"Aid and comfort"	786
Breach of local (foreign) law	733
Breach of international law	737
Breach of national law	744
Concealment and denial of citizenship	720
Different classes of cases	716
Desertion	728
Evasion of national duties	728

CENSURABLE CONDUCT—Continued

	PAGE
Extraneous to claim or injury	718
Fraudulent and exorbitant claims	724
Participation in politics	778
Piracy and slave trade	737
Trading with the enemy	748
Unlawful enemy intercourse	754
Unneutral conduct	715, 752, 755 <i>et seq.</i>
Unneutral military service	766 <i>et seq.</i>
Unneutral supplies and other aid	783
Violation of rights of belligerents	739
Central government, responsibility of	199

CERTIFICATE OF NATURALIZATION:

As evidence of citizenship	514, 519 <i>et seq.</i>
Cancellation of	520, 528, 533
Character as <i>res adjudicata</i>	519
Conclusiveness on international tribunals	522
Conclusiveness upon the executive	526
Conclusiveness on municipal courts	520
Effect given to foreign	521
Finality of	520 <i>et seq.</i>
Fraudulent	520, 522, 528 <i>et seq.</i>
How far internationally binding	517, 519, 533
How granted	519
How revoked	520, 528
Impeachment	517 <i>et seq.</i>
Nature of	519
Practice of international tribunals	522

CERTIFICATES OF REGISTRATION (CONSULAR):

See REGISTRATION.

Certificates of registration (vessels)	479
Evidential character	479
Cession of states	202

CHILDREN:

Act of March 2, 1907, § 5	611
Born on high seas	587
Citizenship at birth	606
Citizenship by naturalization of parent	611
Dual nationality	580 <i>et seq.</i>
Effect of father's expatriation	608, 687
Election of citizenship (if dual)	584 <i>et seq.</i> , 609, 689
Foreign-born American	582, 608
Half-castes	612
Illegitimate	612

CHILDREN—*Continued*

	PAGE
Legitimation	612
Native, taken abroad at early age	584, 698

CHINESE REVOLUTION OF 1911:

Measure of damages	426
Circular of March 5, 1906	653
Interpretation	656
Circular of July 26, 1910	696

CITIZENS:

Born abroad of American fathers	582, 709
Constitutional law	9, 20, 462
Destitute citizens abroad	409
Dual citizenship	575, 580, 582
International law	9, 20, 462
International rights	12
Meaning	557, 698
Rights and duties	12, 21
Subjective rights	17, 30

See also CITIZENSHIP.

EXPATRIATION.

NATIVE CITIZENS.

NATURALIZATION.

NATURALIZED CITIZENS.

CITIZENSHIP:

Abandonment of	694
Assignors and assignees	637
At origin of claim necessary	660 <i>et seq.</i>
At time of presentation of claim necessary	664
Banishment	710
By birth	458, 606
By naturalization	458, 611
By whom determined	486
Cannot be forced upon alien	43, 535, 683, 712, 852
Certificate of registration as evidence of	495, 515
Characteristics of bond	19, 21
Children	606 <i>et seq.</i>
Classes of American citizens	458
Collective naturalization	461
Concealment and denial of	720
Constitutional law	457, 462
Constitutional theory	9, 20
Continuous, necessary for claim	666
Corporations	617 <i>et seq.</i>
Development	7
Derivative claimants	627

CITIZENSHIP—*Continued*

PAGE

Documentary evidence of 492, 512, 515

Dual

See DUAL CITIZENSHIP

Effect of acceptance of political office 687, 712

Effect of marriage upon 593 *et seq.*

Effect of military service abroad 687, 711

Effect of purchase of land 492, 699, 723, 853

Effect of parent's naturalization 611

Equitable owners 642 *et seq.*

Evidence of 512, 516

Fulfillment of duties of 673

Heirs 627

Identification 512, 516

Impeachment 517 *et seq.*

Incomplete 466, 501

In municipal law of U. S. 457

Insurers 646 *et seq.*

"Intent to return" to U. S. 553, 689

International theory 9, 20

Loss of, by residence abroad of naturalized citizens 552, 701

Methods of proof of 488

Missionaries in extraterritorial countries 465, 706

Modes of acquiring 458 *et seq.*

Nature 7

Nature of bond 9, 10

Not heritable indefinitely in extraterritorial countries 465, 609, 709

Partners 613

Passport 493 *et seq.*

Political theory 10

Primary title to protection 457

Proof of 488 *et seq.*, 652, 654Relation to domicil 523, 555 *et seq.*, 683, 698, 852

Renunciation (by naturalized citizens) 552, 680, 701

Renunciation, formal 681 *et seq.*Renunciation, implied 689 *et seq.*

Rules of tribunals of arbitration for proving citizenship 490

Stockholders 619 *et seq.*, 625

Theory of contract 9, 10

Title to international redress 15

Usually essential to protection 462

Who may impeach 517 *et seq.*Women 592, 593 *et seq.**See also* EXPATRIATION.

NATIONALITY.

NATURALIZATION.

NATURALIZED CITIZENS.

	PAGE
Civil rights of aliens.....	69 <i>et seq.</i>
Meaning of term.....	70
Public rights.....	73
 CIVIL WAR:	
Service of aliens in.....	237, 245, 768 <i>et seq.</i>
Civil war injuries.....	228 <i>et seq.</i>
Alien participating.....	237, 244, 852
Calvo's doctrine.....	838
Continued residence by aliens.....	236
Effect of recognition.....	235
Equality of alien and native.....	237, 243, 838
Insurgents beyond control.....	229
Latin-American experience.....	237, 243, 838
Legislative limitations on protection.....	838 <i>et seq.</i>
Liability forced on Latin-America.....	243, 838
Obligations of government.....	231
Rules of the Institute of International Law.....	245, 841
Theories of liability.....	228, 841
Treaties between Europe and Latin-American states.....	244, 838
Voluntary indemnities.....	242
 CIVILIZED JUSTICE:	
Violations of principles.....	333, 344
<i>See also</i> STANDARDS OF CIVILIZED JUSTICE.	
 CLAIM:	
Abandonment of.....	366, 373, 378
Adjustment by arbitration.....	443, 859, 861
Adjustment, present methods.....	861
Adjustment an international proceeding.....	381
Affidavits.....	655
A right of the state.....	178, 352, 353, 362, 666
Assignability.....	636
Circular of March 5, 1906.....	653
Citizen cannot waive right of government to interpose.....	358, 372, 797 <i>et seq.</i>
805 <i>et seq.</i>	
Citizenship at origin necessary.....	629, 637, 660 <i>et seq.</i>
Citizenship at time of presentation.....	629, 637, 664
Claimant's obligations.....	651
Conditions of prosecution.....	651 <i>et seq.</i>
Conditions of presentation imposed by tribunals of arbitration.....	658
Conflicting claims to indemnities.....	392
Continuously owned by citizen.....	638, 666
Depositions.....	654, 655
Direct and indirect injury.....	353, 666

CLAIM—*Continued*

	PAGE
Effect of delay in presenting	825
Effect of diplomatic negotiations on international tribunal	370, 383
Effect of war and treaty of peace	256, 362, 368, 834
Espousal by government	357
Evidence in support	653 <i>et seq.</i>
Exorbitant	724
Fraudulent	367, 385, 724
Government control over, unlimited	358
Government not liable for mismanagement	376
Government not obliged to consult claimant	371
May be pressed, against claimant's wish	371
May be renounced for reasons of public policy	373
Merger of private and national	356, 833
Method of presenting	355, 653, 658
Method of proving title to indemnity	393
National character of	357, 359, 383
Not nationalized by subsequent naturalization of owner or assignment	540, 637 <i>et seq.</i> , 660
Opportunity for presenting	372
"Owned" by citizen	664, 665
Political considerations preventing pressure of	372, 834
Power of government to settle, compromise, release or abandon	366 <i>et seq.</i>
Power of government to modify or reduce	369
Private and public wrong	352, 355, 805 <i>et seq.</i>
Private ownership of	381 <i>et seq.</i>
Right of representation of deceased person	633
Rules for submission	653 <i>et seq.</i>
Settlement an international proceeding	359
Settlement by government estops claimant	368
Speculative	289, 300, 315, 728
Submission to Department	652
Submission to international court	328, 373, 443, 861 <i>et seq.</i>
Surviving private settlement	362
Survivorship of	632
Theory	352, 355, 666
Who may act as legal representative	634

CLAIMANT:

Beneficial owners	642 <i>et seq.</i>
Censurable conduct	713 <i>et seq.</i>
Derivative	381, 391, 392, 627
Determination of amount due	391 <i>et seq.</i>
Finality of Department's determination as to person entitled	396
Heirs	627 <i>et seq.</i>
Memorials of	653
Method of proving title to indemnity	388, 393

CLAIMANT—Continued

PAGE

Nature of his title to claim or indemnity received. 352, 359, 384

Obligations, as conditions of prosecution of claim. 651

Representatives of the government. 216, 223, 361

Seamen on public vessels. 361

Secondary. 381, 391, 392, 627

Successors in interest. 627 *et seq.*

Who is a "claimant". 391

See also CLAIM.

Claimant government judge of international wrong. 331, 861

Claims against states. 177 *et seq.*

Nature of. 178

Coasting trade. 79

Collision between public and private vessels. 166, 188

Commerce, liberty of. 77

Incidental rights. 78

Commerce in munitions of war. 279

COMMERCIAL DOMICIL:*See BELLIGERENT DOMICIL.***COMPENSATION:***See INDEMNITY.***CONCESSION-CONTRACTS:**Calvo clause. 294, 320, 794, 797 *et seq.*, 856**CONCESSIONAIRES:**

Unfair treatment of. 405

Concessions. 292, 336, 401, 405

Confiscatory breach of contract. 292

Connivance at wrong by government. 224

Constitutional position of U. S. on injury to aliens. 202, 225

In matters of distributing awards. 386

In the protection of citizens abroad. 290, 452

CONSUL:

Addressing local authorities. 437

Administration of decedents' estates. 89, 404

Protective functions. 436

Special protection. 216, 223

CONSULAR JURISDICTION:

In extraterritorial countries. 103, 431, 435, 467, 471

Consuls as authorities. 187

Contraband. 112, 271 *et seq.*, 740 *et seq.*

Effect on protection. 739

Contracts, effect of war on. 111

CONTRACT, IMPLIED:

	PAGE
Liability of U. S.	169

CONTRACTS OF THE STATE:

Limitations on authority of public officers.	183, 299
Contracts with government.	127
Increase of contractor's burden by legislation.	127, 171, 322
Officers as authorities.	190, 299
Violation by acts of police (France).	135

CONTRACTUAL CLAIMS:

Arbitrary annulment.	292, 336
Arbitration.	296
Confiscatory breach of contract.	292
Classes, distinctions.	281
Contracts between individuals.	283
Contracts between citizen and foreign government.	284
Contracts for unneutral service.	299, 776, 784
Defects of existing system of enforcing claims.	328
Equitable character.	295
Good offices authorized.	288
Illegal contracts.	301
Impartial courts condition of non-interposition.	291, 292, 335
Jurisdiction of arbitral tribunals.	297
Legislative limitations on protection.	856
Liquidated debt enforced.	296, 316
Meaning of "contractual debts".	321
Measure of damages.	419, 422
Military service.	301, 776
Nature.	282
Palmerston's circular.	290
Policy of the United States.	287, 657
Policy of other governments.	287, 290
Porter proposition at The Hague.	318 <i>et seq.</i>
Practice of arbitral tribunals.	299
Practice of governments.	286
Protection not extended in advance.	289
Public bonds.	302
Qualifications of rule of non-interposition.	291
Reasons for rule of non-interposition.	285
Rule of non-interposition.	284
Speculative contracts.	289, 300, 728
Suggestions for international court.	328
Voluntary services.	300
Weakening or diversion of security.	295, 315
When exhaustion of local remedies unnecessary.	285, 819
When involving elements of tort.	292, 295

	PAGE
Contractual limitation on freedom of legislation	182
Contractual renunciation of protection	792

CONTRIBUTIONS:

See REQUISITIONS AND CONTRIBUTIONS.

CONTROL OF GOVERNMENT OVER CLAIM:

See GOVERNMENT CONTROL.

Copyright	90
Corporate functions of state	117, 122
France	134

CORPORATION:

American	620
Anglo-American law	619
Bibliography	617
Citizenship	617
Civil law, nationality in	617
Conditions of protection	620, 622
Disloyalty of officers	785
Expatriation	680
Foreign	41, 622
Owners of vessels under foreign flags	623
Ownership of stocks and bonds	621, 622, 625
Protection of foreign	622
Rule of international tribunals	623 <i>et seq.</i>
Stockholders' citizenship, effect of	619 <i>et seq.</i> , 625
Substantially owned by American citizens	621, 622

See also FOREIGN CORPORATION.

COURT OF CLAIMS:

In Latin-America	849
Jurisdiction (U. S.)	164
Liability of government (U. S.)	164 <i>et seq.</i>

COURTS:

Absence of impartial	335, 822, 824
Access to	291, 334, 337
Arbitrary executive control of	335
As authorities	195, 343
As instruments of oppression	336, 824
Cannot control executive discretion:	
In distributing indemnities	385
In extending protection	363
Corruption	198

COURTS—*Continued*

	PAGE
Determine questions of private ownership between contesting distributees of indemnities	391 <i>et seq.</i>
Diplomatic claims against municipal decisions	342, 846, 851
Impartiality a condition of non-interposition	291, 335, 822, 824
Infallibility not guaranteed	332
Misapplication of municipal or international law	332
Misinterpretation of law	195, 332
Remedies in municipal	116 <i>et seq.</i> , 822
Right of alien to sue in local	82, 146
Unwillingness to function	336
COURTS, FOREIGN:	
American citizens litigating in	405
Creditors	643
Criminal jurisdiction	99
Over crimes committed abroad	101
Criminal procedure	97
Due process	99, 333, 336
Irregularities	99, 336 <i>et seq.</i> , 736
Criminal proceedings	96 <i>et seq.</i>
Acquittal	99, 736
Charges unproved	99, 736
Denial of justice	100, 333, 337
Disproportionate punishment	99
Grounds of claim	99, 336 <i>et seq.</i>
Lack of jurisdiction	100
Lack of probable cause	99
Protective measures	98, 467, 735 <i>et seq.</i>
Violation of municipal law or treaty	99, 337 <i>et seq.</i>
Criteria of <i>de facto</i> governments	210

CUBANS, PORTO RICANS, FILIPINOS:

Passports	502, 511
Custom-houses, seizure of	449, 453
Customs collectors as authorities	186

CUSTOMS DUTIES:

Collection by <i>de facto</i> authorities	208
By insurgents	239

D

DAMAGES:

Alabama award	414
Chinese revolution of 1911	426
Contractual cases	419, 422

DAMAGES—Continued	PAGE
Death claims	424
Direct and indirect	413 <i>et seq.</i>
Expenses in prosecuting claim	47
Fishing vessels ordered to suspend	421
Interest	428
Maritime torts	419
Personal injuries	423
Profits	414, 417, 419
Proximate	414, 416, 418
Punitive or exemplary	419
Remote	416
Seizure of cargo	420
Speculative	416
Tort claims	422
When indirect damages allowed	416
Days of grace (for departure of enemy vessels)	62, 114, 266
DEATH CLAIMS:	
Measure of damages	424
Debasement of currency	183
DEBTS, PUBLIC:	
Apportionment of	202
Local	204
Transmission of	203, 205
<i>See also BONDS, PUBLIC.</i>	
DECEDENTS' ESTATES:	
Citizenship of original claimant governs jurisdiction	634
Claims of	627 <i>et seq.</i> , 633
Consular administration	89, 404
Law governing distribution of	630
Rules governing right of representation	633
Survivorship of claims	632
Who may act as legal representative	634
DECLARANTS:	
Anomalous position	567
Issuance of passports to	501, 569, 652
Protection in third countries	569, 572
Protection of	466, 568, 691
Declaration of intention	466, 501, 568, 662
By seamen	476
Effect on U. S. citizenship	566, 662
International effects	565
Purpose	566
When unnecessary to admission to citizenship	565

DECLARATION OF INTENTION PLUS DOMICIL:

PAGE

See DOMICIL PLUS DECLARATION OF INTENTION.

<i>De facto</i> authorities.....	183, 205, 239
<i>De facto</i> governments.....	203, 205 <i>et seq.</i> , 239
Constitutional defects internationally unimportant.....	205, 207
Criteria of.....	210
Effect of recognition.....	210
General and local.....	206, 211
Powers of each.....	206 <i>et seq.</i>
Tests of.....	210

DELAY:

In investigating alleged injury.....	337
In presenting claims.....	825

DELAY (OF JUSTICE):

Undue or needless.....	99, 331
Delegated protection.....	471
Accompanying conditions.....	471
Occasions of exercise.....	472
Reimbursement.....	472

DEMAND:

For payment.....	300
For punishment of offenders.....	219

DENIAL OF JUSTICE:

Absence of impartial courts.....	335 , 822
Admitted ground of claim.....	334
Arbitrary annulment of concession contracts.....	292, 336
Arbitrary executive control of courts.....	335
Broad and narrow sense.....	330
Change of personnel of court.....	292
Claimant government determines.....	331, 341
Conditions incident and precedent.....	331, 817
Contractual claims.....	281, 284
Courts as instruments of oppression.....	336, 824
Detention without trial.....	337
Discriminations against alien.....	291, 822
Distinguished from unjust judgment.....	196, 340
Execution without trial.....	337
Failure to afford redress.....	337, 824
Failure to execute judgment.....	199, 339
Failure to institute criminal proceedings.....	337
Failure to punish guilty.....	339
Granting pardon, preventing prosecution of guilty.....	339
Illegal change of personnel.....	338

DENIAL OF JUSTICE—*Continued*

PAGE

Inability of courts to adjudicate	336
Inexcusable delay in investigating offense	337
In general	100, 104, 192, 196, 824
Irregularities in judicial proceedings	333, 336
Legislative definitions	334, 846
Legislative limitations on interposition	824 <i>et seq.</i>
Meaning of the term	330
Partiality of local courts	291, 292
Permitting guilty to escape	337
Preventing judicial recourse	339, 824
Refusal to hear testimony	338
Seizure of property without due process	336
Suppression of local remedy	823
Unduly long detention or imprisonment	337
Unlawful arrest or detention	99, 337
Unlawful change of venue	338
Violation of municipal law	337
Violation of rules for conduct of judicial proceedings	338
Violation of treaty	337
When irregularities are not denial of justice	339

DEPARTMENT OF STATE:

Circular of March 5, 1906	653
Functions in the distribution of awards	387 <i>et seq.</i>
Interpretation of circular of March 5, 1906	656
Practice under Act of Feb. 27, 1896	388 <i>et seq.</i>
Quasi-judicial functions in considering claim	652
Rulings on effect of concealment of citizenship	720
Deposit of national funds received as indemnities	389
Depositions	654
Depreciation of bonds	295, 311, 316
Desertion	728
Destitute and insane citizens abroad	410
Destruction, wanton and unnecessary	193, 233, 260, 261
Destruction of prizes	276
Detention, unjust	98, 337
In war	259
Of vessels	187, 265, 337
Unnecessarily long	99, 337

DIPLOMACY:

As means of protection	439
----------------------------------	-----

DIPLOMATIC OFFICERS:

As authorities	187
Authority	184

DIPLOMATIC PROTECTION:

	PAGE
A limitation on territorial jurisdiction	344, 346
A matter for state's discretion	29, 31, 351
A reserved right of states	28, 346
An extraordinary legal remedy	vi, 352, 667
An international proceeding	354, 357
As a duty	29, 356
As a right of states	vi, 29, 346, 354
Basis of state's action	106, 163, 353
Citizenship usually essential	462
Delegated protected	471
Departure of practice from principle in weaker countries	vi, 28, 346
Discretionary with the government	363
Effect of consular registration	667
Effect of passport	493 <i>et seq.</i>
Exercise of	354, 403
In cases of dual nationality	580
In extraterritorial countries	430, 467
In operation	354, 403
Interposition as a means	441
Naturalized citizen in native country	540
Nature	349
Not a legal right of individual	vi, 39, 356
Object of	457
Of foreigners, occasionally	463
Of missionaries	422, 465
Theory	349 <i>et seq.</i>
Vattel's doctrine	351

See also LIMITATIONS ON PROTECTION.

LOSS OF PROTECTION.

RENUNCIATION OF PROTECTION.

Disavowal of wrongful act of officer	191, 192
--	----------

DISCRETION OF THE GOVERNMENT:

Deference to wish of Congress	363
Free from judicial control	363, 377, 385
In espousing claim	351, 354, 363
In the distribution of awards	385, 390
In the extent of protection	399
In the presentation of claims	365, 372
Not liable for mismanagement	376
Uncontrollable by courts	363, 377, 385
Discriminating duties and charges prohibited	78

DISCRIMINATIONS:

Criminal proceedings	97, 100, 333
In breach of treaty obligations	333

DISCRIMINATIONS—<i>Continued</i>	PAGE
Industrial and economic disabilities	79, 96
Licenses	91
On ground of nationality	100, 291, 334
Ownership of real property	86
Taxation	95
Disloyalty	715, 786, 790
 DISTRIBUTEES:	
French spoliation claims	631
 DISTRIBUTION OF AWARDS:	
Act of Feb. 27, 1896	388
Control of Executive and Congress over	386
Custody of indemnities	389
Determination of who is "claimant"	391
Different stages of proceedings	381 <i>et seq.</i>
Expenses of arbitration	397
Governmental discretion	377, 385
Liens	392
Method of Department in making payment	395
Method of distribution	385 <i>et seq.</i>
Method of proving title to indemnities	393
Nature of claimant's title	384
Practice prior and subsequent to Act of 1896	388
Remedies of rival claimants of award	396
Secondary or derivative beneficiaries	392 <i>et seq.</i>
 DISTRIBUTION OF ESTATES.	
Law governing	630
Diversion of pledged revenue	295, 315, 316
Division of states	202
 DIVORCEES:	
<i>See</i> WIDOWS.	
Dollar diplomacy	327
Domicil	12, 24, 91 <i>et seq.</i> , 555
Abroad, does not denationalize	698
Abroad, effects of	732
As conferring national character	555
Belligerent	110, 253, 559 <i>et seq.</i>
Bibliography	556
Civil	559
Criterion in case of dual nationality	589, 605
Effect given to, by arbitral tribunals	561, 605
Extraterritorial countries	708

DOMICIL—*Continued*

	PAGE
In enemy territory	251, 255, 556 <i>et seq.</i> , 563
In prize law	556, 559
In territory in insurrection	235
Laurent and Uhde cases	562 <i>et seq.</i>
Neutral in belligerent territory	251, 255, 556, 563
Permanent, effects suggested	565
Right to protection arising from	556
Widows	605
Domicil plus declaration of intention	491, 558, 570
Kosztka's case	570
U. S.-Mexican commission of 1868	574, 700
Domiciled aliens	91 <i>et seq.</i> , 691, 842
<i>See also</i> BELLIGERENT DOMICIL.	
Drago Doctrine	308, 312, 317
Relation to Porter proposition	321

DUAL NATIONALITY:

At birth	580
Birth on high seas	587
Children born in U. S.	580
Decisions of arbitral commissions	587
Election of citizenship	576, 584
Foreign-born American citizens	582, 608
Issuance of passports	502
<i>Jus sanguinis</i>	578
<i>Jus soli</i>	577
Manner in which it arises	19, 575
Measures to be adopted to adjust conflicts	590
Methods of avoiding conflicts	578
Native citizens	580, 582
Protection abroad	580
U. S. position in case of naturalized citizens	534, 576
Women	592, 606

DUE DILIGENCE TO PREVENT INJURY:

Acts of individuals	213, 217, 220
Civil war	232
Mob violence	221, 223
To prevent violations of neutrality	278
Due process of law	99, 100, 197, 332, 334, 336

E

East Florida claims	373
-------------------------------	-----

ELECTION OF CITIZENSHIP:

Children	576, 583, 584, 608 <i>et seq.</i> , 689
--------------------	---

ELECTION OF CITIZENSHIP—*Continued*

	PAGE
Method	584
Time of	586, 610
Widows	598, 600, 689
Embargo	265
As reprisal	454
Embargo acts	753
Emigration offenses	550
Enemy character	110, 253
Of vessels	254

ENFORCEMENT OF CLAIMS:

Defects of system	328, 861
Enforcement of the laws	214
"Equal" protection	40, 85, 104
Equal protection of native and naturalized citizen	407, 460, 541
Equality between alien and national	vi, 39, 40, 44, 88, 104, 844
Equality of states	353
Erroneous convictions	129, 196, 737
Errors of criminal justice	129, 196, 737
Germany	146
Errors of justice	101, 195 <i>et seq.</i> , 332, 737
Escape of guilty offenders	218, 337, 339

EXCESS OF POWER:

France	134
Germany	143
Italy	148
Belgium	153
Excess collections of taxes or duties	184
Exclusion of aliens	44 <i>et seq.</i>
Discriminations	47
Grounds announced in advance	46
Haiti's exclusion of Syrians	47
Right of the state	45 <i>et seq.</i>

EXECUTION:

against property of foreign governments	307
✓ Execution of alien without trial	337
Execution of foreign judgments	85
Executive acts	131
Executive authorities	183
Contractual obligations	184
Tortious acts	185
Executive regulations or decrees	127, 181
Executors and administrators	629, 633

EXECUTORS AND ADMINISTRATORS—*Continued*

	PAGE
Citizenship of original claimant governs jurisdiction	634
Consuls	89, 404, 633
Must prove right to appear	393, 634
Personal representative	629, 633, 634
Rules governing right of representation	393, 633

EXHAUSTION OF LOCAL REMEDIES:

See LOCAL REMEDIES.

EXPATRIATION:

Acceptance of pensions, titles, etc.	687
Acceptance of political office	687, 712
Act of March 2, 1907	554, 678, 680
Act of 1868	676, 678 <i>et seq.</i>
Acts which do not effect	711
An individual right	674
Bibliography	683
Circular of April 19, 1907	682
Comparative legislation	683 <i>et seq.</i>
Conviction for crime	687
Corporation	680
Countries which admit, on condition only	546
Countries which deny right of	544, 676
Countries which have naturalization treaties with U. S.	548
Denied	544, 675, 677
Doctrine of voluntary expatriation	542, 674
Effect of prolonged residence abroad	686, 690 <i>et seq.</i>
Effect on wife and children of husband and father's expatriation	687
Evidence of	689 <i>et seq.</i> , 694
Failure to abandon foreign military service	687, 712
Failure to heed <i>jus avocandi</i>	686
History in U. S.	674
Implied	686, 689 <i>et seq.</i>
Intent not to return	686, 689, 691, 694, 701
In time of war	678, 680, 731
Married women	601, 685
Methods of	680, 685
Method of overcoming presumption of, in China and Turkey	465
Methods of overcoming presumption of	694, 703 <i>et seq.</i>
Military service abroad	687, 711, 730
Modes of	680, 685
Native citizens	692, 696 <i>et seq.</i>
Naturalization abroad	681, 685
Oath of allegiance	682
Of applicant for registration	704
Of naturalized citizens	680

EXPATRIATION—Continued

	PAGE
Practice in U. S.	678, 679
Presumption of.	689, 694
Presumption of, how overcome.	555, 703 <i>et seq.</i>
Renunciation of naturalization.	552, 554, 680
Residence in extraterritorial countries.	465, 706 <i>et seq.</i>
Rules for overcoming presumption of expatriation.	704 <i>et seq.</i>
Types of legislation.	683
Unauthorized.	544, 546
Voluntary.	542, 674

See also CITIZENSHIP.

NATURALIZED CITIZENS.

EXPEDITIONS, HOSTILE OR UNLAWFUL:

See HOSTILE EXPEDITIONS.

EXPENSES:

As an item of damage.	417
Of arbitration.	397
✓ Expulsion of aliens.	48 <i>et seq.</i>
A qualified right only.	49
A right of the state.	48
Collective expulsion.	49, 61
Grounds of expulsion.	51 <i>et seq.</i>
Limitations on right.	50
Resolutions of the Institute of International Law.	53
Grounds of international claims.	57 <i>et seq.</i>
Arbitrary expulsion.	57
In violation of municipal law.	57
In violation of treaty.	58
Unduly oppressive exercise of right.	59, 733
Special discrimination.	61
International phases.	55 <i>et seq.</i>
Arbitrary or unnecessarily injurious exercise of right.	56, 733
Communication of reasons to national government on demand.	56
National government passes on justification and sufficiency of evidence.	56
Treaties.	56
In time of war.	61
Method of exercising right.	54
Recent developments.	55
Resolutions of the Institute.	55
Source of the right.	48
Extent of protection.	399
Backward countries.	406, 467
Criminal proceedings abroad.	407
Degree of assistance in special cases.	403
Extraterritorial protection.	430, 467

EXTENT OF PROTECTION— <i>Continued</i>	PAGE
Factors determining	399
Financial relief	409
Fostering American interests abroad	400
Government's action not anticipated	399
Measure of damages	413
Miscellaneous cases	407
Preventive measures	401
Extradition	62
Extraterritorial crime	102

EXTRATERRITORIAL COUNTRIES:

Distinctively American community	465, 609 <i>et seq.</i> , 707
Extent of protection	430, 467
Heritability of citizenship	465, 609, 709
Jurisdiction of the U. S. in	431, 467
Origin and development of system	432
Presumption of expatriation	706
Privileges of extraterritoriality	433
Protection of foreigners	467
Protection and jurisdiction	430, 467
Protégé system	468
Registration in	669
Residence in, prolonged	706
Seamen on national vessels	471
Sources of extraterritorial rights	431
Extraterritorial jurisdiction	8, 26, 430, 467
Extraterritoriality	102

F

Failure of courts to disapprove violations of law	197, 337
Failure to afford redress	189, 192, 199, 213, 223, 337
Failure to execute judgment	199, 339

FAILURE TO EXHAUST LOCAL REMEDIES:

See LOCAL REMEDIES.

Failure to prevent wrong	188, 192, 194, 199, 215, 217
Mob violence	224
Failure to punish guilty offenders	189, 191, 192, 194, 199, 218, 337, 339
Mob violence	225
False imprisonment	99, 337
Feudal system	6
Filibustering expeditions	718, 747, 760 <i>et seq.</i>
Financial intervention	310 <i>et seq.</i>
Financial relief	409
Fishing in coastal waters	79

FISHING VESSELS, INTERFERENCE WITH:

	PAGE
Damages	421
Fiskus	137, 143, 152

FLAG (MARITIME):

Abusive display of	484
Covers cargo	483, 771
Evidence of nationality	115, 478
Evidentiary value as to nationality of vessels	115, 478
Forfeiture of protection of neutral flag	254, 484, 748
Fraudulent use	480
Proper use of	483
Protection afforded by	476, 664
Transfer of flag in time of war	255, 483, 744

FORCE (AS MEANS OF PROTECTION):

Display of	446
Drago Doctrine	312, 317
Intervention	450
Landing troops	450
Military occupation	449
Monroe Doctrine	451
Porter proposition	318, 328
Punitive operations	450
Reprisals	453
Seizure of custom-houses	449
Suppression of local riots	449
To collect claims	449
Use of	448
War	455

FORCE MAJEURE:

In war	256
------------------	-----

FORCED LOANS:

By belligerents	269
By insurgents	239
Treaty exemption of aliens	64, 113
Forcible deprivation of property	293

FOREIGN CORPORATIONS:

Bibliography	<i>Appendix</i>
Different systems	41
Latin-America	853
Law governing	41, 42
Recognition	41

FOREIGN JUDGMENTS:

	PAGE
Execution of	85
When impeachable	341
Foreign jurisdiction	346
Foreign legislation, protest against	290, 316, 401
Foreign states in municipal courts	175

FOREIGNERS:

Delegated protection	471
In "extraterritorial" countries	467
Insurers of American property	649
Matriculation	672
Occasional protection of	463
Protégé system	468
Seamen, foreign, on American vessels	477

See also ALIENS.

FORFEITURE OF PROTECTION:

See LOSS OF PROTECTION.

Fostering American interests abroad	400
---	-----

FRAUDULENT CLAIMS:

Against foreign governments	725
Against U. S.	724
Effect on protection	724
Power of government to abandon	367, 375, 386
Fraudulent registration (of vessels)	480
Freedom of worship	75
French spoliation claims	377 <i>et seq.</i> , 631, 635, 639, 650
Fugitives from justice	719
Function of the state	30

G

GOOD OFFICES:

Contractual claims	288 <i>et seq.</i>
Distinguished from official interposition	440
Generally	332, 440
In cases of moral responsibility of foreign governments	405
Meaning of term	288, 440, 442
Nature	440
When employed	440
Gossin's case	705

GOVERNMENT:

Not a collecting agency	287
Not liable for mismanagement of claim	376

GOVERNMENT CONTROL:	PAGE
Circumstances under which government may be liable to claimant.	378
Discretion as to reparation.	370
Freedom of disposition over claims.	358, 360
No obligation to consult claimant.	371
Not liable for mismanagement.	376
Over awards and indemnities.	382
Power to determine state responsible.	368
Power to modify or reduce claim.	369
Power to settle, compromise, release or abandon.	366 <i>et seq.</i>
Power to renounce indemnity.	373
Private settlement requires government approval, when.	370
Return of excessive indemnities.	375

GOVERNMENT, RESPONSIBILITY OF:

See STATE.

Government forces, injuries by.	233, 244
Governmental functions of state.	117, 122
Guano acts.	407
Guarantee of aliens' safety in backward countries.	215, 406

H

HAGUE REGULATIONS:

On war.	114, 246 <i>et seq.</i> , 263, 265, 266, 267, 268, 270, 275, 277
Harsh treatment unduly (during arrest).	99
<i>Heimatos</i>	19, 591

HEIRS:

As claimants.	606, 627
Citizenship.	627
Decisions of arbitral tribunals.	628
Hostile expeditions.	480, 718, 747, 758 <i>et seq.</i>
Cases before international tribunals.	762
Effect of participation in, upon protection.	760
Executive and judicial rulings.	765
<i>Virginus</i>	480, 765
Zerman expedition.	718, 762
Huerta government.	211
Humanity, intervention for.	14

I

IMMIGRATION LAWS:

Married women.	596
Immunity of private rights in war.	247, 255
Impartial courts.	291, 822

IMPLIED CONTRACT:**PAGE**

(U. S.)	169
Imprisonment	99, 337
Act of July 27, 1868	407
Unnecessarily harsh	99, 340, 408
Inadequate punishment	218, 339

INCOME TAX, PAYMENT:

Effect in overcoming presumption of expatriation	694, 697, 706
"Incommunicado"	99, 337

INDEMNITY OR AWARD:

A national fund	359, 383 <i>et seq.</i>
For war losses	246, 247, 279
Nature of claimant's title to fund	384
No individual lien upon	360, 383
Not held as trustee or agent for private claimant	359, 383
Power of government to renounce	373
Power of government to return excess	375
Private ownership matter of municipal law	381 <i>et seq.</i>
Right of individual to receive	360

INDEPENDENCE OF STATES:

How limited	345
-------------	-----

INDIVIDUAL:

International rights	12
Nationality	15
"Natural" or human rights	13
No lien upon fund received by his government as indemnity	360
Position in international law	16 <i>et seq.</i>
Property in war	113, 246
"Rights of man"	12, 14, 15
Source of rights	11 <i>et seq.</i>
Subject of legal rights	26, 30
Individual, private	213 <i>et seq.</i>
Obligations of government	213
Industrial property	89
Industry, right to carry on	79
Disabilities for economic reasons	79

INJURY:

Indirect to state	353, 666
Meaning of	301, 323
Injustice, notorious	196, 335, 340, 341

INSTITUTE OF INTERNATIONAL LAW:

Civil war injuries	245, 841
--------------------	----------

INSTITUTE OF INTERNATIONAL LAW— <i>Continued</i>		PAGE
Mob violence rules		227
Nationality of aeronaut		587
War claims	248, 259, 265, 270	
Instruction, liberty of		77
Insufficiency of protective measures		224, 230
Insurers		646
American insurers of foreign property		647
Foreign insurers of American property		649
Insurance companies in French spoliation claims	639, 650	
Provisions of federal statutes		650
Insurgents	228 <i>et seq.</i>	
As criminal offenders		238
In control of particular areas		239
In Latin-America	242, 838, 842	
Recognition of		235
Successful		241
Unsuccessful		231
Insurrection		228
INTERCOURSE, RIGHT OF:		
Basis of protection	346, 353	
Interest		428
Rate of		429
INTERFERENCE WITH BUSINESS:		
In war	259, 260	
Intermediary governments		206
International court for adjudication of pecuniary claims	328, 373, 443, 859,	
	861 <i>et seq.</i>	
INTERNATIONAL LAW:		
Breach of		737
Relation to municipal law	17, 178, 857	
International responsibility of the state	177 <i>et seq.</i>	
INTERNATIONAL TRIBUNAL:		
Superior to local courts	343, 805	
INTERPOSITION:		
Constitutional questions		290
Contractual renunciation	792 <i>et seq.</i>	
Distinguished from intervention		441
In bond claims	310 <i>et seq.</i>	
In contractual and in tort claims		282
Informal in contract claims		288
Not formal in contract claims		284

INTERPOSITION—*Continued*

PAGE

Procedure	442
Qualifications of rule of non-interposition in contract claims	291
<i>See also</i> DIPLOMATIC PROTECTION.	

INTERVENTION:

Distinguished from interposition	441
For payment of public bonds	310 <i>et seq.</i>
For protective purposes	450
On ground of humanity	14

INVESTIGATION AND REPORT:

By official representatives	405, 657
Irregularities in procedure	99, 197, 198, 333, 336 <i>et seq.</i>
When not denial of justice	339

J

Jewish passport question with Russia	47
Jews, persecution of	466
Judges, liability of	130, 195 <i>et seq.</i>
Anglo-American law	173
Austria	150
Belgium	154
Germany	143
Hungary	151
Inferior	198
Misfeasance	195 <i>et seq.</i>
Personal acts	198
Judgment in violation of treaty	197, 337
Judicial acts	129, 195 <i>et seq.</i>
Errors of courts	129, 195 <i>et seq.</i> , 332
Excess of jurisdiction	196, 333
State indemnity for errors	129
Judicial assistance (<i>suit in forma pauperis</i>)	82

JUDICIAL CONTROL:

Different systems	118
Power of courts to declare legislation unconstitutional	129

JUDICIAL CONTROL OVER ACTS OF ADMINISTRATION:

Anglo-American system	156 <i>et seq.</i>
Austria	150
Belgium and other countries	153
Continental systems	155
France	134
Germany	142

JUDICIAL CONTROL, ETC.— <i>Continued</i>	PAGE
Hungary.....	151
Italy.....	148
Spain.....	147
Switzerland.....	152
Judicial errors.....	101, 195, 332
Judicial proceedings.....	100
Absence of impartial court.....	335
Abuse of process.....	330, 337
Denial of justice.....	336 <i>et seq.</i>
Violation of internationally sanctioned rules.....	333, 338
Judicial recourse of injured individual.....	189, 192, 199, 219, 223, 334, 337, 339
Judicial remedies.....	82
Non-resident alien's right to sue for injuries causing death.....	84
Suits between aliens in French law.....	84
<i>See also</i> LOCAL REMEDIES.	
Jurisdiction.....	8, 25
In extraterritorial countries.....	430, 467
Of arbitral commissions.....	444
Over foreign states.....	175, 306
Excess of.....	196, 333
JURISDICTION, TERRITORIAL:	
Limited by diplomatic protection.....	102, 334, 346, 354
<i>Jus avocandi</i>	686, 730, 746
<i>Jus gentium</i>	33
<i>Jus soli</i>	577
<i>Jus sanguinis</i>	578
K	
Kosztka's case.....	570
Erroneous interpretations.....	572
L	
Labor, protection of national.....	80
Laches.....	825, 827
Decisions of arbitral tribunals.....	829
LAND, PURCHASE OF:	
Effect on citizenship (Mexico).....	492, 699, 723
Landing of troops.....	450
LATIN-AMERICAN PRINCIPLES, IN RE:	
Aliens.....	838, 842 <i>et seq.</i>
Civil war injuries.....	838

LATIN-AMERICAN PRINCIPLES, IN RE— <i>Continued</i>	PAGE
Claims against the government	849
Claims based on tortious injuries	842
Exhaustion of local remedies	820, 836
Foreign claims	792 <i>et seq.</i> , 836
Matriculation of foreigners	854
Relation between international and municipal law	857
Legal bureaux	436

LEGISLATIVE LIMITATIONS ON PROTECTION:

See MUNICIPAL LIMITATIONS.

Legitimation	612
------------------------	-----

LEGISLATION, ACTS OF:

Contractual responsibility	127
International responsibility	181
Limitations on protection	836 <i>et seq.</i>
Municipal responsibility	125
Unconstitutional	129
Liberty of circulation and emigration	74
Liberty of conscience	75
Licenses to trade	110, 753
Liens on awards or indemnities	392

LIMITATION:

Principle of	825, 828
------------------------	----------

LIMITATIONS ON PROTECTION:

Arising out of political considerations	834
Arising out of subject-matter	833
Breach of local (foreign) law	733
Breach of international law	737
Breach of national law	744 <i>et seq.</i>
By act of citizen. Expatriation	674 <i>et seq.</i>
Censurable conduct of claimant	713 <i>et seq.</i>
Conditions prescribed by claimant's government	651 <i>et seq.</i>
Failure to exhaust local remedies	817
Laches and prescription	825 <i>et seq.</i>
Legislative:	
Civil war injuries	245, 837
Contractual claims	856
Tort injuries	842
Municipal legislation of defendant state	836
Renunciation of protection	792
Liquidated claims	296, 301, 316
Literary property	89

LOANS:

PAGE

See BONDS, PUBLIC.

Local debts. 204

LOCAL PROTECTION:

Obligation to afford. 106, 213, 220, 349

Request of, by foreign governments. 402

Local remedies. 100

Delay in resort to. 825

Exhaustion of, necessary.

See FAILURE TO EXHAUST.

Failure to exhaust. 191, 285, 332, 339, 817

Laches. 825

On bond claims. 305

Position of Latin-America. 820

Prescription. 825

Weakening of, a ground of claim. 292

When unnecessary to exhaust. 285, 292, 332, 335, 819, 821

See also CALVO CLAUSE.

Local revenues, guarantee upon. 204

London Naval Conference. 270 *et seq.*

LOSS OF PROTECTION:

Acceptance of political office. 687, 712, 777

Acts against public policy. 717

Aid and comfort. 786

Banishment. 710

Blackmailing. 719

Breach of international law. 737

Breach of local (foreign) law. 733

Breach of national law. 744

Breach of neutrality. 485, 715, 755

By expatriation. 674 *et seq.*By prolonged residence abroad. 690 *et seq.*Censurable conduct of claimant. 713 *et seq.*

Concealment and denial of citizenship. 720

Desertion. 728

Disloyalty. 715

Evasion of national duties. 728

Ex dolo malo non oritur actio. 714 *et seq.*

Exportation of arms. 761

Failure to exhaust local remedies. 817

Failure to heed *jus avocandi*. 686, 730, 746Fraudulent and exorbitant claims. 724 *et seq.*

Fugitive from justice. 719

Intercourse with enemies. 754

Laches and prescription. 825 *et seq.*

LOSS OF PROTECTION—*Continued*

	PAGE
Military service abroad.....	683, 711, 756, 766, 814
Participation in politics.....	778, 781
Participation in unlawful expeditions.....	760
Permanent residence abroad.....	689, 690 <i>et seq.</i> , 732
Piracy and slave trade.....	737
Privateering.....	756
Renunciation, express.....	792
Renunciation, implied.....	810
Slave trading.....	717
Teaching polygamy.....	719
Trading with the enemy.....	748
Turpitude of claim.....	717
Unfriendly acts.....	780
Unlawful expedition.....	718, 762
Unneutral conduct.....	715, 755 <i>et seq.</i>
Unneutral military service.....	766 <i>et seq.</i>
Unneutral service.....	776, 783, 786
Unneutral supplies and other aid.....	783
Vessel employed in foreign coastwise trade.....	695
Violation of rights of belligerents.....	739

M

"Maine" claim.....	361, 833
Mandamus.....	364, 385, 388, 390, 727
Maritime torts.....	419
Maritime war.....	114, 270 <i>et seq.</i>

MARRIED WOMEN:

See WOMEN (MARRIED).

Martial law.....	100
Matriculation (of aliens).....	74, 723, 854
Effect of failure to matriculate.....	855
Meade claim.....	379

MEANS OF PROTECTION:

Agencies of protection.....	435
Amicable methods.....	439
Arbitration.....	442
Asylum.....	435
Consular service.....	435
Pacific blockade.....	454
Diplomacy.....	439
Diplomatic interposition.....	441
Display of force.....	446
Good offices.....	440

MEANS OF PROTECTION—Continued**PAGE**

Italian government's legal bureaus	436
Landing of troops	450
Mediation	442
Non-amicable methods	445
Presence of war-vessels	446
Punitive operations	450
Reprisals	453
Retorsion	445
Treaties	438
Use of armed force	448
War	455
Withdrawal of diplomatic representative	445

MEASURE OF DAMAGES:*See* DAMAGES.**MEASURE OF PROTECTION:***See* EXTENT OF PROTECTION.

Mediation	442
Memorials of claimants	653
Merger of private and national claim	356, 368, 666
Varying effects of	360

METHODS OF PROTECTION:*See* MEANS OF PROTECTION.

Military authorities	187, 194
Military necessity	246, 255, 256, 262, 264
Military occupation	207, 239, 250, 263, 267
As reprisal	454
To collect claims	449
Military operations	256
Military service	21
As evidence of citizenship	491
Claims for	772, 776
Claims not pressed	301, 776
Desertion	728
Naturalized citizens in native country	365, 676

MILITARY SERVICE ABROAD:

Breach of neutrality	759
Claims for	301, 772, 776
Effect on citizenship	687, 711, 730, 767, 772, 814
Effect on protection	683, 711, 730, 747, 766 <i>et seq.</i>
Participation in unlawful expeditions	760
Privateering	756
Prohibition by municipal law	69, 747, 767

MILITARY SERVICE ABROAD—Continued

	PAGE
Unneutral service.....	766
Military service cases.....	543 <i>et seq.</i>
Emigration offenses.....	550

MILITARY SERVICE, COMPULSORY:

Alien's right to leave country.....	68
By aliens.....	64
By domiciled aliens.....	64, 68
Commutation of service.....	67
Exemptions by municipal law.....	67
May be required to enroll for urgent local protection.....	66, 778
Requisitions.....	68
Treaty exemption.....	64, 113
Mines (in war).....	259
Minor officials.....	185, 189
Resort to local remedies necessary.....	191
State liable for failure to punish wrongdoing.....	191
Minors (citizens).....	459, 583
Minor's clause.....	565
Missionaries.....	222, 465
Presumption of expatriation overcome.....	465, 707

MIXED COMMISSIONS:

See TRIBUNALS OF ARBITRATION.

Mixed courts.....	104
Mob violence.....	214, 216, 220
Belgium.....	154
Burden of proof.....	221
Claims usually pressed immediately.....	365
France.....	141, 227
Judicial recourse.....	223
Municipalities liable.....	141, 154, 226
Obligations of government.....	220
Statutory compensation.....	141, 226
Rules of the Institute.....	227
United States.....	158, 225, 226

MONOPOLIES, ESTABLISHMENT OF STATE:

International responsibility.....	182
Municipal responsibility.....	126
Monroe doctrine.....	308, 325, 451
Does not prevent forcible measures in collection of claims.....	326
Mortgages.....	645
Municipal corporations.....	117
Anglo-American system.....	157
As contractors.....	200

MUNICIPAL CORPORATIONS—Continued	PAGE
Belgium	154
France	140
Liability for mob violence	141, 154, 226
 MUNICIPAL COURTS, DECISIONS OF:	
Not a defense against claim founded on violation of international obligations	342, 846, 851
Remedies in	116 <i>et seq.</i> , 822
 MUNICIPAL LAW:	
Aliens	38
Not a defense against violation of international obligations	39, 105, 181, 214, 226, 828, 845, 847, 851
Relation to international law	17, 178, 857
Municipal law, violations of	337
(foreign)	733, 780
(national)	745, 758 <i>et seq.</i>
Neutrality acts	758 <i>et seq.</i>
Waiver of violation	746
 MUNICIPAL LEGISLATION:	
Protest against	290, 316, 401, 847
 MUNICIPAL LIMITATIONS ON PROTECTION:	
Cannot bar international rights	845
Civil war injuries	245, 837
Claims based on tortious injuries	842
Contractual claims	856
Matriculation (as a foreigner)	854
Originating conditions	836
Subtle legislative measures to avoid interposition	844
Municipal responsibility of the state	116 <i>et seq.</i>
Anglo-American system	156
Austria	150
Belgium and other countries	153
By statute in U. S. and Great Britain	162
Comparison of continental systems	155
For tort (U. S.)	166
France	138
Germany	142
Hungary	151
Incidence of liability between state and officer	120, 132, 138
Italy	148
No legal responsibility for mismanagement of claim	376
On contract	170
Spain	147

MUNICIPAL RESPONSIBILITY OF THE STATE— <i>Continued</i>		PAGE
Switzerland.....		152
Theories.....		133
Mutual concessions by states.....		344

N

NATION:

Different meanings.....	12
-------------------------	----

NATIONALITY:

Absence of.....	19, 590
As test of status.....	555
Bibliography.....	683
Evidence of (vessels).....	478
<i>Heimatlos</i>	19, 590
No nationality.....	19, 590
Of vessels.....	115, 478
Test of enemy character.....	253
<i>See also</i> CITIZENSHIP.	
Native citizens.....	606, 611
Foreign-born.....	582, 608
Passports.....	510, 512
Payment of income tax.....	694, 697, 706
Permanent residence abroad.....	584, 689, 690 <i>et seq.</i> , 696, 698
Tests as to retention of American citizenship when permanently resident abroad.....	697
Native teachers and converts.....	466, 468, 470
Natives, punishment of.....	449
Naturalization.....	9, 458
Abandonment.....	52, 680, 701
Abuse of.....	522, 528, 538, 552, 663, 720, 721, 732, 811
As a judgment.....	519 <i>et seq.</i>
Bancroft treaties.....	548
By acceptance of public office.....	535
By military service.....	711, 772
Cancellation.....	520, 528, 533
Collective.....	461
"Continuous residence" (in U. S.).....	537
Conditions of recognition.....	535, 677
Criteria of fraud.....	529, 532
Does not nationalize foreign claim.....	540, 660
Effect in native country.....	541, 677
Fraudulent.....	520, 522, 528 <i>et seq.</i> , 538
Germany and Austria-Hungary.....	550
How obtained.....	519
How proved.....	488, 512

NATURALIZATION—*Continued*

PAGE

International effects.....	533, 677
Internationally important features of American naturalization.....	536
Must be voluntary.....	43, 535, 683, 712, 852
Nature and effect.....	533
Nature of proceedings.....	519
Non-retroactive.....	539
Of American citizen abroad.....	681
Of parent, effect on children.....	611
Of seamen.....	475
Presumptions of fraud.....	529
Relations with France, Switzerland and other countries.....	546
Relations with Turkey and Russia.....	544
Renunciation.....	550, 552, 702
Residence requirements.....	537
Revocation.....	520, 528, 533
Secondary evidence to prove.....	489, 497
Treaties with various countries.....	548
Without effect on absent family.....	598

See also CERTIFICATE OF NATURALIZATION; NATURALIZED CITIZENS.

NATURALIZED CITIZENS:

Abroad.....	460, 541, 553
Absent family.....	598
Act of March 2, 1907.....	554, 460, 702, 732
Fraudulent.....	522, 529 <i>et seq.</i> , 538
In contiguous countries.....	704
In extraterritorial countries.....	706, 709
"Intent to return" to U. S.....	553
Loss of citizenship.....	461, 530 <i>et seq.</i> , 552
Married women.....	596
Passports.....	510
Permanent residence abroad.....	530, 533, 552, 703
Protection in native country.....	541, 675, 732, 736
Relations of U. S. with various native countries.....	543 <i>et seq.</i>
Residence abroad.....	531, 550, 552, 554, 680, 686, 701, 732
Renewal of residence in native countries.....	550, 552, 701, 736
When protection forfeited.....	530
Naval authorities.....	187

NEGLECT (OF CLAIMANT):

In enforcing claims.....	827
--------------------------	-----

NEGLIGENCE OF GOVERNMENT:

In adjustment of claims.....	376
In investigating case.....	192, 218
In preventing injury or punishing guilty.....	214, 219

NEGLIGENCE OF GOVERNMENT—*Continued*

PAGE

Negligence of the claimant.....	714
Neutral rights and obligations.....	112, 251, 270, 277, 563

NEUTRALITY:

Forfeiture of.....	485, 759 <i>et seq.</i>
--------------------	-------------------------

NEUTRALITY, BREACH OF:

See UNNEUTRAL CONDUCT.

Neutrality Acts of U. S.....	759
Non-intercourse acts.....	454, 753, 755
Notice to government to prevent injury.....	219

O

Obligations of the state, local protective.....	106, 213, 220
Oath of allegiance.....	586, 682
Office holding.....	687, 712, 777, 813
Officers, liability of.....	124
Anglo-American system.....	156, 173
Austria.....	150
Belgium and other countries.....	153
Comparative law.....	171
Continental systems.....	154
France.....	138
Germany.....	144
Hungary.....	151
Italy.....	149
Judicial.....	130
Legislative.....	129
Methods of protecting officer.....	171
Personal acts.....	190
Spain.....	147
Switzerland.....	152
Tortious acts.....	185, 189, 190

OFFICERS, PUBLIC:

Authorities (contractual matters).....	170, 183, 299
Distinction between official and personal acts.....	190
Legal relation between state and officer.....	186
Limitations on authority.....	183
Minor.....	185, 189
Of political subdivisions of state.....	201
Powers strictly construed.....	183, 299
Tortious acts.....	185
When state liable.....	186, 189 <i>et seq.</i>
Oppressive treatment (during arrest).....	99
Organs of the state.....	180

OWNERS:	PAGE
Beneficial.	381, 391, 627, 642 <i>et seq.</i>
Equitable.	642 <i>et seq.</i>

OWNERSHIP OF INDEMNITIES:	
How established.	388, 392 <i>et seq.</i>
Pacific blockade.	454

P

PALMERSTON'S CIRCULAR:	
On pecuniary claims.	290
On protection of naturalized subjects.	543
On public loans.	314
Pardon of offenders.	218, 239
Pardon, petition for.	409
Partition of states.	202

PARTNERS:	
American, associated with aliens.	613
Decisions of international tribunals.	614
Disloyalty of one.	715, 785
Effect of belligerent domicile of one.	559, 615
Surviving.	616, 635

PARTNERSHIPS:	
Claims.	613 <i>et seq.</i>
Effect of war.	111, 254
Legal entity in civil law.	615
Types.	615

PASSPORT:	
Amendment of.	514
Applications.	509, 652
Authority to issue.	508
Blank forms.	511
By whom issued.	496, 508
Cases of dual allegiance.	502
Child of naturalized citizen.	510
Chinese.	410
Circular instruction Dec. 21, 1914.	512
Conditions of issuance.	509, 652, 695
Conditions of validity not disclosed.	518
Control of.	598
Cubans, Porto Ricans, Filipinos.	502
Declarant's.	501, 569, 652
Discretion in issuance.	364, 494, 508

PASSPORT—*Continued*

PAGE

Duration	498, 511
Effect of permanent residence abroad	695
Emergency	497, 512, 513
Evidential value as to citizenship	489, 493, 496, 517
Expiration and renewal	498, 511
Fee	509
Foreign-born native citizen	510
Fraudulent	518
Impeachment of	517
Jewish citizens in Russia	506
Local legalization	507
Maritime	478
Names of countries to be visited	513
Native citizens	510, 512
Nature and purpose of system	493
Naturalized citizens	510, 512
Other documents of similar effect	499
Precautions during European War	402
Protection papers	500
Regulations governing issuance	496 <i>et seq.</i>
Relation to protection	493 <i>et seq.</i>
Requirements of foreign governments	504
Special	495
To whom issued	500
Visé	504 <i>et seq.</i>
When refused	495, 719
Who included in	503, 511
Who may impeach	517
Woman's application	510
Patent rights	89
In U. S.	168
Pelletier and Lazare claims	374, 386, 717, 738
Person protected	457 <i>et seq.</i>

PERSONAL INJURIES:

Measures of damages	423
Personal laws	44
Personal sovereignty	8, 23
Personal representative	629, 633, 634
Who may act	634
Personality of law	3, 24
Petition, right of	76
Petition of right	162
Pillage	188, 193, 233, 260
Piracy	737, 756, 766
Platt Amendment	326, 401, 411

	PAGE
Plundering, by soldiers	193
Police negligence	224, 225
Police officials	188, 193
 POLICE POWER:	
Closure of port	181
France	134
Germany	144
Italy	149
 POLITICAL CONSIDERATIONS:	
As a limitation on protection	372, 834
 POLITICAL OFFICE, ACCEPTANCE OF:	
Effect on citizenship	687, 712, 813
Political rights and duties of aliens	63 <i>et seq.</i>
 POLITICAL SUBDIVISIONS OF STATE:	
<i>See</i> SUBDIVISIONS OF STATE, POLITICAL.	
Political theory	10, 30
Politics, participation in	778, 781, 815
Poor relief	81, 410
Porter proposition at The Hague	318 <i>et seq.</i> , 329
Defects	328
Relation to Drago Doctrine	321
Ports, closure of	181, 234
Prescription	825 <i>et seq.</i>
Effect of delay in presenting claim	825 <i>et seq.</i>
Decisions of arbitral tribunals	829
Laches	827
Limitation	828
 PRESENTATION OF CLAIMS:	
Within definite time	366
Preventive measures of protection	401
 PRIVATE AND PUBLIC INJURY:	
Effects of merger of different classes of claims	360
Merger of	356
Relation between	355 <i>et seq.</i> , 362
 PRIVATE INDIVIDUALS:	
<i>See</i> INDIVIDUALS, PRIVATE.	
Private property	12
At sea	110, 114, 253, 270

PRIVATE PROPERTY—*Continued*

PAGE

Appropriation of:

Civil war.....	234
War.....	246, 252, 262

Taken for public use.....	169, 184, 188, 194
---------------------------	--------------------

Privateering.....	458, 756
-------------------	----------

Decisions of arbitral tribunals.....	757
--------------------------------------	-----

PRIZE:

Destruction of prizes.....	276
----------------------------	-----

In neutral waters.....	276
------------------------	-----

Law of.....	270 <i>et seq.</i>
-------------	--------------------

Made after treaty of peace.....	250
---------------------------------	-----

PRIZE COURTS:

American citizens before foreign.....	405
---------------------------------------	-----

International prize court.....	276, 343, 861
--------------------------------	---------------

Unjust decisions not binding on foreign government.....	342
---	-----

Professions, practice of certain.....	80
---------------------------------------	----

Profits, prospective.....	414, 416, 419
---------------------------	---------------

PROPERTY:

Destroyed to prevent falling into enemy's hands.....	264
--	-----

Of aliens in war.....	246
-----------------------	-----

Right of removal.....	88
-----------------------	----

Prostitution, practice of.....	719
--------------------------------	-----

PROTECTION:

As between states.....	18, 26
------------------------	--------

By virtue of citizenship.....	16
-------------------------------	----

In operation.....	25, 27, 178
-------------------	-------------

Result to individual.....	18
---------------------------	----

Theory.....	30, 353, 666
-------------	--------------

See also DIPLOMATIC PROTECTION;

LOSS OF PROTECTION.

Protégé system.....	468
---------------------	-----

Protests against proposed law of foreign country.....	290, 316
---	----------

Public authorities protection act.....	173
--	-----

PUBLIC DEBTS:

Not affected by war.....	112
--------------------------	-----

Of Central-American states.....	325
---------------------------------	-----

See also BONDS, PUBLIC;

DEBTS, PUBLIC.

PUBLIC OFFICERS:

See OFFICERS, PUBLIC.

Public power, state as a.....	122, 125
-------------------------------	----------

	PAGE
Public rights of aliens.....	73 <i>et seq.</i>
Coastal fishing.....	79
Coasting trade.....	79
Court proceedings.....	82
Execution of foreign judgments.....	85
Freedom of speech and press.....	76
Freedom of worship.....	75
Individual liberty.....	74
Judicial remedies.....	82 <i>et seq.</i>
Liberty of circulation.....	74
Liberty of commerce.....	77
Liberty of conscience.....	75
Liberty of instruction.....	77
Liberty of trade.....	78
Poor relief.....	81
Practice of professions.....	80
Right of association and assembly.....	76
Right of petition.....	77
Right to carry on industry.....	79
Right to labor.....	80
Right to sue <i>in forma pauperis</i>	82
Punishment, disproportionate.....	99

PUNISHMENT OF GUILTY OFFENDERS:

Condition of state irresponsibility.....	191, 194, 213
Punishment of natives.....	449
Punitive expeditions.....	450, 454

Q

Quartering.....	268
-----------------	-----

R

Ransoms.....	220, 413
Ratification of wrongful act.....	191, 217

REAL PROPERTY:

Effect of purchase of, upon citizenship.....	492, 699, 723, 853
Ownership by aliens.....	86, 853
Prohibition to own gives no right of arbitrary spoliation.....	87, 853
Succession.....	87
Receivers.....	642

RECIPROCITY:

Rights of aliens in municipal law.....	71
--	----

RECOGNITION:

	PAGE
Effect of	236
Of belligerency of insurgents	235
Of <i>de facto</i> government	210
Refusal to investigate injury	192

REGISTRATION OF ALIENS:

See MATRICULATION.

REGISTRATION (CONSULAR):

American corporation	622
As evidence of citizenship	491, 495, 515, 667, 723
Conditions	695, 704
Effect of failure	668, 669, 689, 723
Election of citizenship	600, 609, 668, 689
In extraterritorial countries	669
Of children	609, 689
Of widows	600, 668, 689
Porto Ricans, Filipinos	672
Proof of citizenship	669
Purpose	516, 667
Regulations of 1907	670
Relation to protection	622, 667, 723

See also MATRICULATION (OF FOREIGNERS).

REGISTRATION, CERTIFICATE OF:

As evidence of citizenship	495, 515, 671
Contents	670, 672
Effects of	515
Practice of U. S.	515
Proof of citizenship	516
Purposes	516
Regulations	670, 695

RELATION:

Between international and municipal law	17, 178, 857
Between states	344
Release of claims	366 <i>et seq.</i> , 373, 378

RELIEF OF CITIZENS ABROAD:

Financial	409 <i>et seq.</i>
Religious persecution	466
Relinquishment of private claims for public benefit	378

RENUNCIATION OF CITIZENSHIP:

By naturalized citizen	530, 680, 702
Evidence of	694 <i>et seq.</i>

RENUNCIATION OF CITIZENSHIP—Continued	PAGE
Failure to register in consulate	689
Formal	681 <i>et seq.</i>
Implied	686, 689 <i>et seq.</i>
<i>See also</i> EXPATRIATION.	
Renunciation of claims	366 <i>et seq.</i> , 373, 378
RENUNCIATION OF PROTECTION:	
Calvo clause	294, 320, 792 <i>et seq.</i>
Express renunciation	792
Implied renunciation	810 <i>et seq.</i>
Repatriation	25, 688
Women (after dissolution of marriage)	598, 600, 601, 688
Representation, right of	633 <i>et seq.</i>
Representatives of the government, injury upon	216, 223, 361
REPRISALS:	
For non-payment of claims	286, 453
Repudiation of public debts	305, 308
Requisitions and contributions	68, 113, 114, 263, 267
Res adjudicata, plea of	342
RESIDENCE ABROAD:	
In enemy territory	110, 253, 559
Not a forfeiture of citizenship	12, 558, 690
RESIDENCE ABROAD, PERMANENT:	
Decisions of arbitral tribunals	698
In extraterritorial countries	465, 706, 708 <i>et seq.</i>
Native citizens	689, 690 <i>et seq.</i> , 696, 732
Naturalized citizens	530, 533, 552, 701, 703
Tests as to retention of citizenship	697
RESIDENCE ABROAD, PROLONGED:	
Act of March 2, 1907	701
By owner of American vessel	694
Circular instruction July 26, 1910	696
Decisions of arbitral tribunals	698
Effect on citizenship	686, 690 <i>et seq.</i>
Effect on right of protection	690 <i>et seq.</i> , 732
Effect on right of registration	695
In extraterritorial countries	706 <i>et seq.</i>
Intent not to return	694, 696
National state determines effect	692
Native citizens	692, 696
Naturalized citizens	701
Rules of 1907, practice under	695

RESIDENCE (IN U. S.):

PAGE

"Continuous residence".....	537
Naturalized citizens.....	517, 519, 530, 532

RESPONSIBILITY OF STATE:

International.....	18, 25, 177 <i>et seq.</i>
Legislative limitations upon.....	838 <i>et seq.</i>
Municipal.....	116 <i>et seq.</i>
Pan-American conventions.....	844
Restrictions imposed by international law upon municipal law.....	37, 39
Results of protection.....	439
Retaliation.....	445, 454
Retorsion.....	445
Revolution.....	228 <i>et seq.</i>
Successful.....	241
Unsuccessful.....	231

REVOLUTIONISTS:

See INSURGENTS.

Right of intercourse.....	35, 45
Rights of man.....	12 <i>et seq.</i>
Riots, suppression of.....	449
<i>See also</i> MOB VIOLENCE.	
Rousseau's doctrine concerning war.....	246

RULES:

For issuance of passports.....	508
For submission of claims.....	653 <i>et seq.</i>

S

SEAMEN:

American seamen, meaning.....	475
Classes protected by U. S.....	475
Declaration of intention.....	476
Destitute.....	476, 478
Extraterritorial jurisdiction.....	471
Foreign, on American vessels.....	476 <i>et seq.</i>
How naturalized.....	475
On foreign-built vessels flying American flag.....	477, 482
On public vessels.....	361
Protection.....	471, 475 <i>et seq.</i>
Security for costs.....	82

SECURITY:

Diversion of.....	295
Weakening of.....	295

	PAGE
Sedition	228
Seizure of property, unlawful	336
Self-help	453
Self-preservation, a right of states	45, 271, 353
Ship's papers	478
Siege	256
Slave-trade	737

SOLDIERS:

As authorities	188, 193
Under command	194
Unofficered	193, 260
Sovereignty	8
Sovereigns as authorities	183
"Special protection"	40, 179, 216, 222
Speculative claims	289, 300, 315, 728
Speech and press, freedom of	76
Spoliation	261, 267
Standards of civilized justice	vi, 179, 333, 334, 350

STATE, THE:

Claims against	177 <i>et seq.</i>
Corporate functions	117
Full discretion in prosecuting claim	354, 363
Function of protection	30
Governmental functions	117
Immunity from suit (Anglo-American system)	159
Indemnity for war losses	246, 247, 279
Injured in the person of its citizen	351, 666
International responsibility	177 <i>et seq.</i>
Municipal responsibility	116 <i>et seq.</i>
Not an agent or trustee for citizen	357, 359
Political theory	10, 30
Suability of:	
<i>See</i> SUABILITY.	
Succession	202

STATE, DUTY OF:

Administrative machinery	213
Not a guarantor of safety of aliens	213
To afford local protection	106, 213, 220, 349
To prosecute private wrongdoers and wrongdoing officers	186, 191, 194, 199, 337, 339
To protect citizen abroad	29, 356

STATE LIABILITY FOR:

Acts of officers	170, 186
----------------------------	----------

STATE LIABILITY FOR—*Continued*

PAGE

Disavowal of act insufficient.....	191
Failure to afford redress.....	189, 192, 199, 217, 337
Failure to prevent wrong.....	188, 192, 194, 199, 215
Failure to provide local protection.....	215, 221
Failure to punish guilty offender.....	191, 194, 199, 337, 339
Inadequate punishment.....	218, 339
Pardon to guilty offenders.....	218, 339
Refusal to investigate injury.....	192, 337
Unlawfully preventing appeal.....	239

STATE AND CITIZEN ABROAD

Evasion of national duties by citizen.....	728
Military service.....	21, 730
Private international law.....	23, 345
Protection abroad.....	24, 26, 30, 345, 354, 713 <i>et seq.</i>
Reciprocal rights and duties.....	21, 732
Taxation.....	22

STATUS OF INDIVIDUAL:

Law governing.....	24
--------------------	----

STOCKHOLDERS:

Alien enemy.....	112
Effect of their citizenship on protection.....	619 <i>et seq.</i> , 625
Suability of state.....	124, 160, 285, 291
In claims arising out of unpaid bonds.....	305
<i>See also MUNICIPAL RESPONSIBILITY.</i>	

SUBDIVISIONS OF STATE, POLITICAL:

Contracts with.....	200
International responsibility.....	199
Municipal liability.....	160

SUBJECTION TO TERRITORIAL LAW:

See SUBMISSION.

Subjects of international law.....	16 <i>et seq.</i> , 26
Submarine mines.....	259
Submission to local law.....	vi, 94, 104, 179, 333, 344, 349, 733, 793, 795
Conditions of submission in criminal cases.....	101, 333
Successful revolutionists.....	241
Succession, rights of.....	630, 633
Law governing.....	630, 834
Of aliens.....	87
Of states.....	202
Succession taxes.....	88

	PAGE
Successors in interest.....	627 <i>et seq.</i>
Assignees.....	636
Assignees in bankruptcy.....	641
Creditors.....	643
Executors and administrators.....	629, 633
Heirs.....	627
Insurers.....	627 <i>et seq.</i>
Mortgagees.....	645
Personal representatives.....	633, 634
Receivers.....	642

SUIT AGAINST STATE:

See MUNICIPAL RESPONSIBILITY.

SUIT AGAINST FOREIGN STATES:

In municipal courts.....	175
--------------------------	-----

T

Tariff duties.....	182
Excessive collections.....	184
Taxation.....	22, 95
Double taxation.....	22, 96

TAXES:

Collected by <i>de facto</i> authorities.....	208
---	-----

TERRITORIAL JURISDICTION:

See JURISDICTION, TERRITORIAL.

Territorial sovereignty.....	8, 24, 27
Territoriality of law.....	3
Titles to land.....	834
Tort claims.....	185, 282
Maritime torts.....	419
Measure of damages.....	422

TRADE DOMICIL IN WAR:

See BELLIGERENT DOMICIL.

Trade, right to.....	78
Unlawful.....	748
Trade-marks.....	90
Trading with enemies.....	110, 253, 748
Licenses.....	110, 753
Prohibition upon neutral vessels.....	752
Transfer of flag.....	255, 483, 744

TRANSFER OF FLAG—*Continued*

	PAGE
Colorable	484, 724, 743
Transient aliens	91, 350, 691

TREATIES:

As means of protection	438
Limiting diplomatic interposition	840, 843, 852
Limitation of liability in civil war injuries	244, 838
Naturalization	548

TREATY OF PEACE:

Effect on claims	256, 362, 368
Treaty rights of aliens	18, 107, 201, 202, 226
Practice of Department of State in addressing Governors	403
Within jurisdiction of courts	108
Treaty, violations of	337
Trespasses and evictions	336

TRIBUNALS OF ARBITRATION:

Calvo clause	800 <i>et seq.</i>
Citizenship at origin	662
Citizenship at time of presentation	664
Claims for military service	772, 776
Claims for unneutral contracts	784
Conclusiveness of certificate of naturalization	522
Conditions for presentation of claim	658
Corporation claims	623
Determination of jurisdiction	444
Determination of questions of citizenship	486
Effect of concealment of citizenship	721
Effect of contractual renunciation of protection	800 <i>et seq.</i>
Effect of diplomatic negotiations upon	370, 383
Effect of domicile	561
Effect of private waiver of claim	372, 800
Effect of prolonged residence abroad on citizenship	698
Effect on jurisdiction of stockholders' citizenship	625
Heirs as claimants	628
Jurisdiction over bond claims	322
Jurisdiction over contractual claims	297
Laches and prescription	829
Married women and widows	605
Partnership claims	614
Powers	524
Practice in matters of contractual claims	299
Privateering	757
Proof of citizenship, rules concerning	490
Questions of dual nationality	587

TRIBUNALS OF ARBITRATION— <i>Continued</i>	PAGE
Rules governing right of representation	633
Unlawful expeditions	762
Unlawful trade with enemies	752
Tucker Act	164 <i>et seq.</i> , 395, 659

U

Unconscionable awards	374, 384
Unfriendly acts	780
Aid and comfort	786

UNITED STATES:

Constitutional questions in enforcing rights of aliens	108, 226, 403
Jurisdiction of courts	108
Position of aliens	107
United States and Latin-American public debts	326
Unjust arrest or detention	98, 337
Unjust enrichment	184

UNJUST JUDGMENT:

Distinguished from denial of justice	196, 340
Effect of	196, 331, 340
How far internationally binding	340
Not a bar to international claim if illegal	342
Plea of <i>res adjudicata</i>	342
Reached by proper observance of legal forms	332

UNLAWFUL EXPEDITIONS:

See HOSTILE EXPEDITIONS.

Unlawful arrest or detention	98, 337
Unneutral character	263
Unneutral conduct	715, 752, 755 <i>et seq.</i>
Neutrality statutes of U. S.	758
Privateering	756
Unfriendly acts	780
Unlawful expeditions	758 <i>et seq.</i>
Unneutral military service	766 <i>et seq.</i>
Unneutral service	112, 254, 271, 776
Contracts for	299, 774, 776
Waiver by government	300, 776
Unneutral supplies and other aid	783
Aid and comfort	786
Unsuccessful revolution	231 <i>et seq.</i>

V

Vattel's theory of protection	351, 666
---	----------

VESSELS (AMERICAN):

	PAGE
Abusive display of flag.....	484, 743
Acceptance of privateering commission.....	485
American ownership title to protection.....	480
Bill of sale.....	479
Certificates of registration.....	479
Days of grace to depart, in war.....	62, 114, 266
Effect of belligerent domicile of owner.....	483
Evidence of nationality.....	478
Evidentiary value of flag.....	115
Flag.....	476, 478
Flying foreign flag.....	482
Foreign-built, flying American flag.....	477, 480
Fraudulent registry.....	480
In distress.....	94
In foreign employment.....	481, 695, 770, 813
<i>Jus angariæ</i>	255, 267
Licenses for trading with enemy.....	110, 753
Neutral vessels prohibited to engage in unlawful trade.....	752
Ownership.....	80, 479, 480
Privateering.....	756
Proof of claim, arising from capture of.....	655
Protection of cargo.....	483
Protection of persons upon.....	476
Registered and unregistered.....	479
Seamen on.....	475
Seizure of, as reprisal.....	453
Ship's papers.....	478
Subject to seizure in war.....	270
Transfer of flag.....	255, 483, 744
Unlawful detention.....	98, 187
Unlawful expeditions.....	758, 762
Unlawful trade.....	748
<i>Virginius</i> case.....	479, 765

VESSELS, PUBLIC:

Torts of.....	166, 188
Torts against.....	419
<i>Virginius</i> case.....	479, 765
Visit and search.....	112, 272
Resistance to.....	739, 744
Voluntary services.....	300

VOTING:

As evidence of citizenship.....	491
Effect on citizenship.....	712
Effect on protection.....	779

W

WAIVER OF CLAIM:	PAGE
By laches	827
Effect of private waiver on international tribunal	372, 800
Private waiver does not affect right of government	358, 372, 797
Waiver of forfeiture of protection	746, 785
 WANTON ACTS:	
By soldiers	193, 233, 260
Of bombardment	258
Of destruction	261
 WAR:	
Acts of war	256, 257
Alien enemies	111, 251
Angary	113, 253, 255, 267
Appropriation of property	262
Arrest and detention	259
A state of war	248
At sea	114, 270
Battle	256
Belligerent acts	256
Belligerent domicil	110, 251, 750
Belligerent obligations (maritime)	271 <i>et seq.</i>
Blockade	271, 274, 739
Bombardment	256, 259
Booty	260
Cable-cutting	265
Contraband	112, 271 <i>et seq.</i> , 740
Contracts	111
Days of grace for enemy vessels in port	62, 114, 266
Effect of treaty of peace	256, 362, 368, 834
Embargo	265
Enemy property	112, 255
Enemy vessels	266
Enemy character	110, 253
Expatriation during	687, 731
Hague Regulations	114, 251, 256, 263
Incidental results	259, 260
Indemnities	280
indicia	248
Military occupation	207, 239, 250, 263, 267
Neutral obligations (maritime)	277
Neutral persons	112, 251
Neutral property at sea	270
Neutral property on land	114, 234, 251, 255, 563, 812

WAR—*Continued*

	PAGE
Occupation of buildings	264
On land	255
Partnerships	111, 254
Pillage	260
Position of aliens	109, 250
Prize courts	272, 275
Requisitions and contributions	267
Rules of the Institute	248, 259, 265, 270
Siege	256
State indemnity	246, 247, 279
Stockholders	112
Submarine mines	259
Trading between enemies	110, 253, 748
Transfer of flag	255, 483, 744
Vessels exempt from seizure	271
Wanton destruction of property	261
War measures, legitimacy	261
Withdrawal from enemy territory	750, 812
War claims	246 <i>et seq.</i>
Land war	248, 255

WAR LOSSES:

Classes	247
Principles	256
War measures, legitimacy of	261
As reprisal	455

WAR VESSELS:

To collect claims	446
Ward claim	288, 301
Weil and La Abra claims	375, 386, 726

WIDOW:

American-born, of alien	604
Citizenship	598, 604
Decisions of international tribunals	605
Effect of consular registration	605, 668, 689
Election of citizenship	598, 600, 604, 689
Foreign born, of American citizen	598
Passport	510
Withdrawal of diplomatic representative	445

WOMEN (MARRIED):

American-born wife of alien	601, 604
Citizenship	592, 593 <i>et seq.</i> , 685
Decisions of international tribunals	605

WOMEN (MARRIED)— <i>Continued</i>	PAGE
Effect of husband's expatriation	687
Effect of marriage upon citizenship	593, 685
Expatriation	601, 685
Foreign-born wife of American citizen	594
Foreign-born widow of American citizen	598
In connection with Immigration Act	596
Japanese	671
Passports	510
Repatriation	598, 600, 601, 688
<i>See also</i> WIDOW.	

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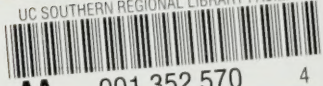
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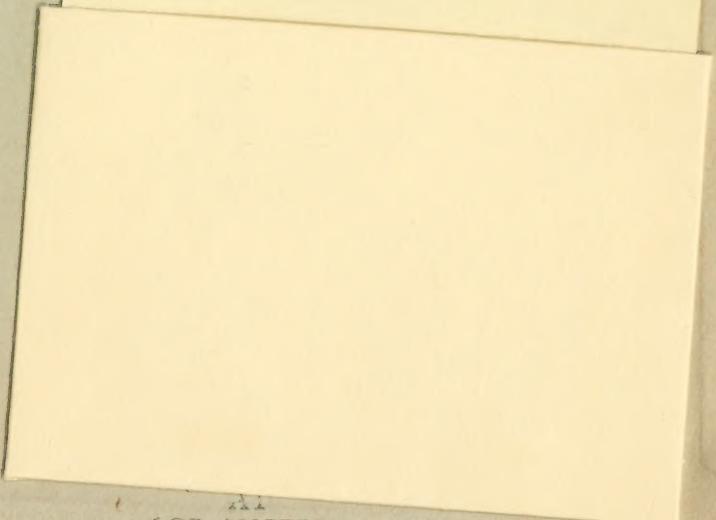
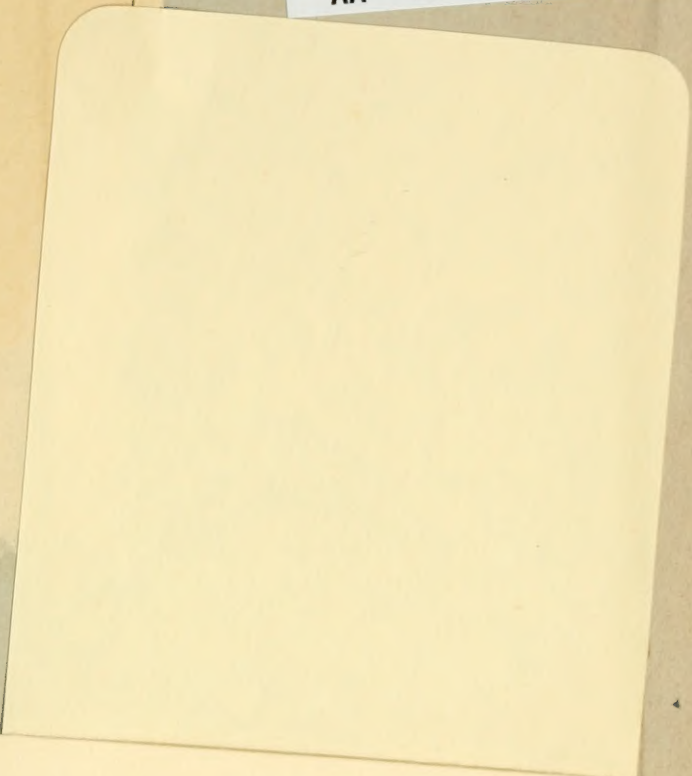


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